IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-782

MISSISSIPPI POWER & LIGHT COMPANY, et al.,
Petitioners

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and UNITED STATES OF AMERICA,
Respondents

NUCLEAR ENGINEERING COMPANY, INC.,
Petitioner

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

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Petitioners Mississippi Power & Light Company, *et al.*,[1] and Nuclear Engineering Company, Inc., re-

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[1] Petitioners in the first case also include Arkansas Power & Light Company, Baltimore Gas & Electric Company, The Cincinnati Gas & Electric Company, Columbus & Southern Ohio Electric Company, The Dayton Power and Light Company, Duke Power Company, Long Island Lighting Company, New York State

spectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these two proceedings on August 24, 1979.

OPINION BELOW

The opinion of the court of appeals (App. B, *infra,* 5a-23a) is reported at 601 F.2d 223.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 24, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

QUESTIONS PRESENTED

1. Whether the Independent Offices Appropriation Act, as construed by this Court in *National Cable Television Association, Inc.* v. *United States,* 415 U.S. 336 (1974) and *Federal Power Commission* v. *New England Power Co.,* 415 U.S. 345 (1974) authorizes the Nuclear Regulatory Commission, whose regulatory and licensing activities are conducted to protect the public health and safety, to impose a license fee for the

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Electric & Gas Corporation, Pacific Gas and Electric Company, Public Service Company of Colorado, Sacramento Municipal Utility District, South Carolina Electric & Gas Company, Southern California Edison Company, and Yankee Atomic Electric Company. Attached as Appendix A is a list of companies which have an interest in the outcome of this proceeding. Parent companies are listed parenthetically. These representations are made in order that the Justices may evaluate possible disqualification or recusal.

full cost of protective services which wholly or overwhelmingly benefit the general public and not the licensee.

2. Whether the Nuclear Regulatory Commission may refuse to refund license fees illegally collected under its 1973 fee schedules, where such schedules were based on the principle of industry-wide, full cost recovery rejected by this Court in *National Cable Television Association, Inc.* v. *United States,* 415 U.S. 336 (1974) and *Federal Power Commission* v. *New England Power Co.,* 415 U.S. 345 (1974).

STATUTES AND REGULATIONS INVOLVED

Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a; 10 C.F.R. Part 170 (1974) and 10 C.F.R. Part 170 (1979) are set forth in Appendix E, *infra,* 43a-119a.

STATEMENT OF THE CASE

On August 1, 1968, the Atomic Energy Commission ("AEC"), the statutory predecessor of the Nuclear Regulatory Commission ("NRC"), adopted a schedule of license fees pursuant to Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a ("IOAA"), to be imposed in conjunction with its licensing activities, including review of applications for construction permits and operating licenses for nuclear reactors and for certain materials license applications. It also imposed fixed annual fees on operating nuclear facilities and certain materials licenses which the Commission subsequently agreed had been illegally assessed.[2] After two further revisions, the

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[2] 33 Fed. Reg. 10923 (1968); 10 C.F.R. Part 170 (1969). *See* notes 31 and 32, *infra.*

AEC adopted a third revision of its license fee schedule, effective August 10, 1973, providing for the full cost recovery of expenses associated with its licensing and inspection programs, which imposed a multifold increase in the fees previously assessed.[3]

Following the decisions of this Court in *National Cable Television Association, Inc.* v. *United States,* 415 U.S. 336 (1974) ("*NCTA*") and *Federal Power Commission* v. *New England Power Co.,* 415 U.S. 345 (1974), which invalidated the fees and assessments of two federal agencies pursuant to the IOAA, a petition for rulemaking was filed on May 2, 1974 with the AEC by a number of petitioners herein and others requesting that the Commission amend its 1973 fee schedule in conformity with the *NCTA* and *New England Power* criteria, and that the Commission refund or credit fees illegally assessed under the old schedule.[4] Six months later, on November 11, 1974, the AEC proposed its own revised schedule.[5] In the notice of rulemaking, the AEC stated that it had eliminated annual license fees and would refund those collected under the 1973 fee schedule "[i]n view of the Court's decision[s]

[3] The sole criterion for determining whether costs were recoverable as fees was merely whether they were "associated with the Commission's licensing and health and safety compliance and inspection program." 38 Fed. Reg. 18443 (1973). The 1973 fee schedule was the subject of coment by the Solicitor General in *Federal Power Commission* v. *New England Power Co.*, 415 U.S. 345, 350 n.4 (1974), who advised this Court that the AEC was one of two federal agencies "'having industry-wide regulatory authority' . . . which impose 'annual industry-wide fees analogous' to those in the instant case," which this Court ruled invalid under the IOAA.

[4] 39 Fed. Reg. 17879 (1974).

[5] 39 Fed. Reg. 39734 (1974).

[*NCTA* and *New England Power*] regarding annual fees and careful evaluation of the AEC license fee structure." However, the NRC did not discuss the other fees collected under its 1973 schedule, which were left unchanged and were not refunded.

On February 9, 1978, three years following the filing of the petition for rulemaking in May 1974, the Commission revised its 1973 fee schedule by publication of a final rule in the rulemaking proceeding,[6] which substantially increased the fees collected by the NRC under its fee schedules, and denied the 1974 petition for rulemaking filed by a number of petitioners herein to establish fees which quantify the true value to petitioners of the NRC's regulatory activities and to refund excessive fees.

On March 16, 1978, a timely petition for review, pursuant to 42 U.S.C. § 2239 and 28 U.S.C. § 2342(4), was filed by petitioners herein in the Fifth Circuit Court of Appeals for review of the final order of the NRC dated February 9, 1978. With respect to those issues for which review is now sought by certiorari, the petition there alleged that the NRC had acted beyond the authority granted it under the IOAA as follows: (1) the Commission made no attempt to allocate and exclude from the fee schedule those expenditures for services

[6] 43 Fed. Reg. 7210 (1978); 10 C.F.R. Part 170. A new proposed notice of rulemaking had previously issued on May 2, 1977, 42 Fed. Reg. 22149 (1977), following four license fee decisions by the Court of Appeals for the District of Columbia. *National Cable Television Association, Inc.* v. *FCC,* 554 F.2d 1094 (D.C. Cir. 1976); *Electronic Industries Association* v. *FCC,* 554 F.2d 1109 (D.C. Cir. 1976); *National Association of Broadcasters* v. *FCC,* 554 F.2d 1118 (D.C. Cir. 1976); *Capital Cities Communications, Inc.* v. *FCC,* 554 F.2d 1135 (D.C. Cir. 1976).

conducted to benefit the public; (2) the Commission improperly sought to recover expenses incurred by environmental reviews and inspections under the National Environmental Policy Act; (3) the Commission had improperly included a charge for routine inspections of nuclear facilities, which are not a part of the process of obtaining a license to construct or operate a nuclear facility and which are performed solely to benefit the public; (4) the Commission had improperly charged for costs associated with uncontested hearings, although their statutory purpose is solely for the public interest; (5) the Commission illegally refused to refund fees collected under its 1973 fee schedule (except for annual fees) in effect until March 23, 1978, which was predicated upon the principle of full cost recovery industry-wide rejected in *NCTA* and *New England Power*.

By decision dated August 24, 1979, the Fifth Circuit Court of Appeals affirmed the 1978 rulemaking order in all respects. Specifically, the court held that environmental reviews conducted by the NRC were chargeable to licensees "because they are a prerequisite to the issuance of a license" (App. B, *infra*, 18a), despite the "obvious public benefit flowing from the preparation of these environmental reviews." (*Id.*) Similarly, the court stated that uncontested hearings, where there is no controversy between the NRC staff and the applicant and no party has intervened to oppose the application, are chargeable because "these costs are necessarily incurred by the agency in providing a service to the applicant" (App. B, *infra*, 19a). While the court below was "certain that the public benefits from routine inspections which protect the health and safety of the general populace," it sustained the charge for routine inspections because they are "needed to assure

a licensee's compliance with the Atomic Energy Act and with Commission regulations necessary for retention of the license" (App. B, *infra*, 17a). The court's opinion wholly failed to consider petitioners' claims as to the illegality of the 1973 fee schedule and for refunds, except to state that it had "examined the remaining contentions" and found them to be without merit (App. B, *infra*, 23a).

REASONS FOR GRANTING THE PETITION

I. The decision of the court of appeals represents a serious misconstruction of an important federal statute and seriously departs from the applicable criteria for setting license fees established by this Court in *NCTA* and *New England Power*. Although only NRC fee schedules were reviewed, the decision below would apparently authorize any federal agency to recover any and all costs as part of its fee schedule as long as the cost could be tied in any way, however remotely, to the administrative process of issuing the license. The test utilized by the court of appeals frankly disavows any consideration of the overwhelming public benefits of certain NRC licensing activities, such as environmental reviews and routine inspections, and thereby ignores the important criterion of "value to the recipient" established in *NCTA* and *New England Power*.

Thus, the court below would permit a federal agency to recover any cost "necessarily incurred" by reason of the license application, ignoring the public benefit from the service rendered. In adopting the simplistic "but for" test, the court below greatly expanded the reach of the IOAA, which this Court has read "narrowly to avoid constitutional problems" of an illegal

tax.' The fee schedule adopted by the NRC is no less a tax merely because the Atomic Energy Act of 1954 has required licensees to avail themselves of the NRC's regulatory machinery in order to conduct their business. Congress "has presumably chosen this course more to benefit [the public] than the [licensees]." *Bullock* v. *Carter,* 405 U.S. 134, 148 (1972). *See, e.g.,* 42 U.S.C. §§ 2011-13.

Although the court of appeals below gave lip service to the limitations on fees imposed by *NCTA* and *New England Power,* the court ultimately failed to abide by those criteria, namely:

> (1) A fee is ordinarily chargeable only when "incident to a voluntary act," such as an application that a public agency license a certain activity;[8]
>
> (2) A fee is chargeable only if the grant of authority by the regulatory agency "bestows a benefit on the applicant, not shared by other members of society";[9]
>
> (3) "Value to the recipient" is the correct measure of the authorized fee; consideration of "public policy or interest served" is irrelevant;[10]

[7] *National Cable Television Association* v. *United States, supra,* at 342; *Federal Power Commission* v. *New England Power Co., supra,* at 351. By its overemphasis on the language and "clear legislative intent" (App. B, *infra,* 16a) of the IOAA that agency services be self-sustaining, to the full extent possible, the court overlooked the admonition of this Court in *NCTA* that the statute, if read literally, would authorize fee assessment beyond "value to the recipient" and render the fee an illegal revenue measure. 415 U.S. at 341.

[8] *National Cable Television Association* v. *United States, supra,* at 340.

[9] *Id.* at 341.

[10] *Id.* at 342-43.

> (4) The regulatory agency may assess "only specific charges for specific services to specific individuals or companies";[11]
>
> (5) Each "'identifiable recipient'" may be charged only for that "unit of service from which 'he derives a special benefit'";[12]
>
> (6) "[N]o charge should be made for services rendered 'when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public.'"[13]

The court below vastly oversimplified the application of these principles, or merely ignored them, by disregarding the multiple aspects of the lengthy NRC procedures for the issuance of a construction permit and operating license required by statute to build and operate a nuclear reactor as well as the inspection and license amendment programs that continue for the life of the facility to protect public health and safety. Instead, the court contracted these multifaceted licensing procedures into a single process conferring only a single "benefit."[14] No "value to the recipient" determination mandated by this Court in *NCTA* and *New England Power* was attempted by the court below. Thus, the court utterly failed to examine critically the benefits derived from each component "unit of service" rendered in the process and automatically approved the charge if it were "necessarily incurred" in reviewing the permit or license application. In any event, the

[11] *Federal Power Commission* v. *New England Power Co., supra,* at 349.

[12] *Id.* at 351.

[13] *Id.* at 350 (citing Budget Circular No. A-25, September 23, 1959).

[14] App. B, *infra,* 17a-21a.

court ignored the distinction between NRC licenses, which only protect public health and safety, and those which apportion and distribute "scarce resources," such as broadcast frequencies allocated by the FCC. *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94, 101 (1972); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 394 (1968).

A. The court below improperly sustained charges for environmental reviews conducted by the NRC Staff under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* ("NEPA"). The NRC has determined that the licensing of a nuclear facility is a major federal action significantly affecting the quality of the human environment under 42 U.S.C. § 4332.[15] *See* 10 C.F.R. § 51.5. NEPA does not purport to confer benefits on specific individuals or sectors of the public, but was enacted rather as a means for protecting the entire environment of the country in general.[16] As noted,

[15] NEPA is essentially a procedural statute, requiring that an environmental impact statement provide a federal agency with sufficient information to weigh the environmental consequences of a proposed action significantly affecting the environment and to make such information available to the public. *E.g., Daly* v. *Volpe,* 514 F.2d 1106, 1108 (9th Cir. 1975). The environmental impact statement is directed to the public at large, the agency to whom the application was submitted, and other governmental agencies. *Environmental Defense Fund, Inc.* v. *Corps of Engineers,* 492 F.2d 1123, 1136 (5th Cir. 1974); *Environmental Defense Fund, Inc.* v. *Froehlke,* 473 F.2d 346, 350-51 (8th Cir. 1972).

[16] NEPA was enacted in recognition of the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man." 42 U.S.C. § 4331(a). The Act sets forth "the continuing policy of the Federal government . . . to use all practical means and measures" to carry out the Act's policy "in a manner calculated *to foster and promote the general welfare . . . of present and future generations of Americans." Id.* (emphasis added).

the court incorrectly reasoned that each step in the NRC licensing process provides value to the recipient because the license ultimately issued is a "special benefit."[17]

However, the court failed to treat an environmental review as a "specific service" or "unit of service" whose costs are assessable only if the preparation of environmental impact statements provide "value to the recipient" and confer benefits "not shared by other members of society." Obviously, weighing environmental pros and cons confers no value upon nuclear reactor licensees and is quintessentially a service for which "the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." Two district courts have disallowed any license fee charge for environmental analysis under the IOAA.[18]

B. The court below also sustained the NRC's "Schedule of Facility Routine Health, Safety and Environmental Fees,"[19] and the "Schedule of Facility Routine Safeguards and Inspection Fees."[20] These impose

[17] The court would exclude NEPA costs only in generic proceedings because benefits from programmatic environmental statements would accrue to the public as well as license recipients "as yet unidentified" (App. B, *infra,* 18a n.17). However, the court did not specify any "benefit" to the licensee derived from either a particularized *or* a general NEPA analysis.

[18] *Alumet* v. *Cecil D. Andrus,* Civil Action No. C-76-287 (D. Utah 1978) (Appendix C, *infra,* 24a-32a), *rev'd on other grounds,* No. 78-1546 (10th Cir. 1979) (Appendix D, *infra,* 33a-43a); *Public Service Co.* v. *Andrus,* 433 F.Supp. 144 (D. Colo. 1977). The court of appeals in *Alumet* did not address the IOAA because, on appeal, the Secretary abandoned his reliance on that statute.

[19] 43 Fed. Reg. 7220 (1978); 10 C.F.R. § 170.23.

[20] 43 Fed. Reg. 7220 (1978); 10 C.F.R. § 170.24.

charges for inspections which are to be performed over the life of a power reactor "to assure that . . . licensees conduct their activities in a manner that adequately protects the health, safety and security of the public and the environment in which they live."[21] Like environmental analyses, these are likewise "protective services" whose costs are non-recoverable under the IOAA and the *NCTA* and *New England Power* cases. Routine NRC health and safety inspections go to the very heart of the Commission's oversight of the nuclear industry. *NCTA* proscribes the recoupment of such oversight costs because the regulatees "would be paying not only for benefits they received but for the protective services rendered the public by the Commission."[22] Such inspections " 'can be primarily considered as benefitting broadly the general public.' "[23]

The court of appeals nonetheless reasoned that routine inspections were necessary in order for the licensee to keep its license, and that the retention of the license is of "unquestionable benefit to the applicant" (App. B, *infra,* 18a). The court's reasoning turns the regulatory scheme on its head by mischaracterizing the obvious purpose of routine inspections. Since practically every federal license is revocable for cause, a federal agency could, under the court's holding, assess the regulated industry the full cost of oversight as a charge for assisting the regulatees in keeping their licenses. Also, it is anomolous to suggest that such routine inspections are meant to "assist" the licensee, since their very purpose is to detect violations which could lead

[21] 42 Fed. Reg. 22152 (1977).

[22] 415 U.S. at 341.

[23] 415 U.S. at 350.

to suspension or revocation of the license, as well as the imposition of civil penalties. *See* 10 C.F.R. § 2.200 *et seq.* Until the NRC inspection occurs, there is no finding of noncompliance that threatens license retention in the first place. Thus, the true purpose of such inspections is to police the regulatory sphere in order to safeguard the public health and safety.

C. The court below improperly allowed recoupment of other agency costs for which no specific unit of service or identifiable recipient had been determined in the NRC rulemaking. The costs of uncontested hearings[24] were sustained by the court because they are "necessarily incurred" by the NRC in reviewing the application. For the reasons discussed above, with respect to NEPA analyses and routine inspections, this "but for" standard fails to apply the essential criteria of *NCTA* and *New England Power,* which require close scrutiny of each unit of service to determine if value to an identifiable recipient has been rendered and, if so, whether the service in any event primarily benefits the general public.

The analysis of the court of appeals is similarly defective in sustaining the recovery of NRC costs for NRC general program direction and administration as well as technical support costs, intra-office management overhead costs, and costs attributable to interest and depreciation on plant and capital equipment. The court below placed undue emphasis upon the recovery

[24] Section 189 of the Atomic Energy Act, *as amended,* 42 U.S.C. § 2239, requires a hearing on an application for a permit to construct a nuclear reactor facility, even if there is no controversy between the NRC staff and the applicant as to the issuance or any of the terms of a permit, and no party has sought to intervene. *Compare* 10 C.F.R. § 2.4(n).

by the NRC of its "*full cost* of providing a service to a beneficiary" (App. B, *infra,* 21a), despite the admonition in *NCTA* that "[i]t is not enough to figure the total cost (direct and indirect) to the Commission for operating a [regulatory] unit of supervision and then to contrive a formula that reimburses the Commission for that amount."[25]

D. Even assuming that some of the protective services rendered by the NRC provide some incidental benefit to licensees, the IOAA does not authorize the NRC to recoup its entire costs for providing such services. In *NCTA,* this Court recognized that at least a portion of an agency's regulatory costs must be attributed to benefits conferred on the public at large. As with the CATV industry examined in *NCTA,* the backbone of the nuclear industry is "individual enterprise and ingenuity, not governmental largesse."[26] And, likewise "[t]he regulatory regime placed by Congress and the courts over [the nuclear industry] was not designed to make entrepreneurs rich but to serve the public interest"[27] by providing for, *inter alia,* "a

[25] 415 U.S. at 343. The NRC's 1978 fee schedule also imposes a charge for antitrust review conducted under Section 105 of the Atomic Energy Act of 1954, *as amended,* 42 U.S.C. § 2135. While the fee is comparatively small in relation to charges for environmental reviews and routine inspections, this charge is another clear example of an assessment for protective services to the public generally. Obviously, licensed utilities derive no benefit at all from a determination by the Commission that "its activities under the license would create or maintain a situation inconsistent with the antitrust laws." Section 105c(5) of the Atomic Energy Act, *as amended,* 42 U.S.C. § 2135(c)(5).

[26] 415 U.S. at 343.

[27] *Id.* As the Court noted in *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers,* 367 U.S. 396, 402 (1961), quoting an AEC statement with approval,

program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public."[28] Thus, as this Court similarly concluded regarding the FCC's regulation of the CATV industry, "[c]ertainly some of the costs" involved in NRC licensing have "inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume."[29]

"public safety is the first, last and a permanent consideration in any decision on the issuance of a construction permit or a license to operate a nuclear facility." The point was reiterated by the NRC in *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 and 2), 4 NRC 480, 490 (1976).

[28] 42 U.S.C. § 2013(d).

[29] 415 U.S. at 343. The Court in *NCTA* also cited a statement by Congressman Yates, explaining the philosophy of the IOAA, that regulated industries licensed by the Government " 'should pay *some* of the cost of the hearings.' " *Id.* (emphasis added).

The court below relied upon dictum to the contrary in *Electronic Industries Association* v. *FCC,* 554 F.2d 1109, 1114 n.12 (D.C. Cir. 1976), that a fee may be charged where the service does not "primarily" benefit the licensee. The court below also ber 25, 1959), permitting full recovery of costs for rendering a service conferring special benefits to an identifiable recipient, but overlooked the fact that "special benefits" are themselves "above and beyond those which accrue to the public at large" (App. B, *infra,* 17a).

The court further upheld the NRC's position that allocation of costs would result in arbitrary percentages, but, ironically, considered it less arbitrary to assess 100% of the costs to the licensees where the licensee unquestionably received substantially less than 100% of the benefits. Indeed, the court expressed its belief that allocation, if required, would "likely result" in the reduction of most agency fees to "mere tokens," (App. B, *infra,* 16a, implicitly acknowledging that NRC licensing benefits redound overwhelmingly to the public.

The NRC cannot, therefore, determine the true "value to the recipient" of a unit of service unless it excludes expenditures or portions of expenditures made to benefit the public broadly. In ruling that the NRC is entitled to recover the full cost of performing a service which substantially or even predominantly benefits the general public, the court of appeals erroneously ignored the stated truism that at least *some* of the regulatory costs *must* inure to the benefit of the public unless the regulatory scheme is a failure.[30]

E. Even if the 1977 schedule were valid, the 1973 schedule must fall for the same reasons this Court struck down the agency fees in *NCTA* and *New England Power*. The court of appeals did not discuss petitioners' request for a refund of fees collected under the NRC 1973 fee schedule. As noted, the Solicitor General conceded in *New England Power* that the AEC 1973 fee schedule imposed "annual industry-wide fees analogous" to those struck down by the Court in that case. It is undisputed that the 1973 fee schedule was in its entirety based upon the principle of full cost recovery industry-wide for licensing, inspections, and

[30] Congress has itself recognized the principle of cost allocation. 43 U.S.C. § 1734. The Tenth Circuit in *Alumet* v. *Cecil D. Andrus, supra*, interpreted the cost allocation requirement under § 1734 so as to conform to the standard of "value to the recipient" established by *NCTA* and *New England Power*. The court stated that the allocation requirement imposed by Congress in assessing "reasonable costs" reflects a congressional awareness of the constitutional bounds imposed by those decisions:

> We shall assume that Congress was aware of its limitations in delegating the authority to "tax." The language of § 1734(b) reflects that understanding in that Congress expressed that the Secretary should consider the benefit to the general public in its attempted recoupment of costs of an EIS. [Appendix D, *infra*, 42a]

health and safety compliance."[31] Inasmuch as the other fees charged by the NRC in its 1973 fee schedule were based on the same invalid principle upon which annual fees were calculated, it follows that the remainder of the 1973 fee schedule is likewise defective. In summarily denying the rulemaking petition seeking a refund of fees collected under the 1973 fee schedule, the NRC failed to apply the "value to the recipient" and other standards enunciated in *NCTA* and *New England Power*.[32] The NRC should be required either to refund all fees collected under the 1973 fee schedule, consistent with its refund of annual fees, or instructed to recompute the allowable fees on the basis of correct standards.

II. The approach adopted by the Fifth Circuit in permitting a blanket license fee assessment under the IOAA and the holding of the District of Columbia Circuit that a fee may be charged where the public benefit exceeds the benefit to a license recipient presents a conflict among the circuits. The position of each court also conflicts with this Court's rulings in *NCTA* and *New England Power*. As noted, the Fifth Circuit estab-

[31] The NRC 1971 and 1972 fee schedules were "based on the principle of full cost recovery." 36 Fed. Reg. 145 (1971); 37 Fed. Reg. 8074 (1972). In addition to the concession of the Solicitor General, the NRC has itself stated that its 1973 fee schedule covered all costs "associated with" its licensing and inspection activities, 38 Fed. Reg. 18443 (1973), further demonstrating the full cost recovery character of the schedule.

[32] In the court below, the NRC defended its action merely by stating that it had "reexamined its 1973 fee schedule in light of *NCTA* and *NEP* and determined that only the annual fees it collected were legally suspect." Brief for Respondent NRC at 47-48 (footnote omitted). However, nothing in the rulemaking proceeding shows how those principles were in fact applied. *See* 43 Fed. Reg. 7217-18 (1978).

lished a "but for" standard which treats the agency license as a single, package benefit without allocating the cost of component activities between the private licensee and the public at large on the basis of the benefit to each. Thus, the Fifth Circuit methodology permits a charge for each aspect of the licensing process even if the benefit to the license recipient is remote or nonexistent, except for the license itself. No allocation of benefits and costs to the licensee and the public generally is considered.

The District of Columbia Circuit stops short of permitting recovery of any agency cost associated with the licensing process. However, the District of Columbia Circuit has erroneously expanded the *NCTA* and *New England Power* criteria from the strict requirement of "value to the recipient" to a new standard that requires only "a certain nexus, a threshold level of private benefit" [33] before any charge to a licensee can be assessed. Thus, while the District of Columbia Circuit would exclude under the IOAA an assessment for expenses "only tangentially related to grants of operating authority," [34] putting it in conflict with the Fifth Circuit's "but for" standard, the District of Columbia Circuit has incorrectly construed the decisions of this Court not to require allocation of costs even where the benefit to the public is greater than the benefit to the

[33] *Electronic Industries Association* v. *FCC*, 554 F.2d 1109, 1114 (D.C. Cir. 1976).

[34] *National Cable Television Association, Inc.* v. *FCC*, 554 F.2d 1094, 1104 (D.C. Cir. 1976).

licensee.[35] Review by this Court is clearly warranted in order to correct these erroneous and conflicting constructions of the IOAA.[36]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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[35] *Electronic Industries Association* v. *FCC, supra,* at 1114 n.12.

[36] In *Alumet* v. *Cecil D. Andrus, supra,* the Tenth Circuit recognized that under the *NCTA* and *New England Power* standard of "value to the recipient," the licensing agency must distinguish between and allocate benefits inuring to the public generally and those exclusively benfitting the licensee. While the *Alumet* decision pertains to fees assessed under the Federal Land Policy Management Act of 1976, 43 U.S.C. § 1701 *et seq.*, the court of appeals applied the *NCTA* and *New England Power* standards on the assumption "that Congress was aware of its limitations in delegating the authority to 'tax.' " Appendix D, *infra,* 42a. Accordingly, the restrictions imposed upon fee assessment by the *Alumet* court apply across the board on a constitutional basis to any statute authorizing the collection of fees, including the IOAA, and conflict with decisions of the other circuits not requiring allocation.

APPENDIX

APPENDIX A

The undersigned counsel of record certifies that the following listed companies have an interest in the outcome of this case. Parent companies are listed parenthetically. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Offshore Power Systems (Westinghouse Corp.)
2. Alabama Power Co. (The Southern Co.)
3. Arizona Public Service Co.
4. Arkansas Power & Light Co. (Middle South Utilities, Inc.)
5. Associated Electric Cooperative
6. Atlantic City Electric Co.
7. Baltimore Gas & Electric Co.
8. Boston Edison Co.
9. Carolina Power & Light Co.
10. Central Iowa Power Cooperative
11. Central Maine Power Co.
12. Central Power & Light Co. (Central & South West Corp.)
13. Cincinnati Gas & Electric Co.
14. City of Austin
15. City of Dalton
16. City Public Service Board of San Antonio
17. Cleveland Electric Illuminating Co.
18. Columbus & Southern Ohio Electric Co.
19. Commonwealth Edison Co.
20. Connecticut Light & Power Co. (Northeast Utilities)
21. Connecticut Yankee Atomic Power Co.
22. Consolidated Edison Co. of New York, Inc.
23. Consumers Power Co.
24. Corn Belt Power Cooperative
25. Dairyland Power Cooperative
26. Dallas Power & Light Co. (Texas Utilities Co.)
27. Dayton Power & Light Co.

28. Delmarva Power & Light Co.
29. The Detroit Edison Co.
30. Duke Power Co.
31. Duquesne Light Co.
32. El Paso Electric Co.
33. Eugene Water & Electric Board
34. Florida Power Corp.
35. Florida Power & Light Co.
36. Georgia Power Co. (The Southern Co.)
37. Gulf States Utilities Co.
38. Hartford Electric Light Co. (Northeast Utilities)
39. Houston Lighting & Power Co.
40. Illinois Power Co.
41. Indiana & Michigan Electric Co. (American Electric Power Co., Inc.)
42. Interstate Power Co.
43. Iowa Electric Light & Power Co.
44. Iowa-Illinois Gas and Electric Co.
45. Iowa Power and Light Co.
46. Jersey Central Power & Light Co. (General Public Utilities Corp.)
47. Kansas City Power & Light Co.
48. Kansas Gas & Electric Co.
49. Long Island Lighting Co.
50. Los Angeles Department of Water & Power
51. Louisiana Power & Light Co. (Middle South Utilities, Inc.)
52. Madison Gas & Electric Co.
53. Maine Yankee Atomic Power Co.
54. Metropolitan Edison Co. (General Public Utilities Corp.)
55. Mississippi Power & Light Co. (Middle South Utilities, Inc.)
56. Municipal Electric Authority of Georgia
57. Nebraska Public Power District
58. New England Electric Co.
59. New York State Electric & Gas Co.

60. Niagara Mohawk Power Corp.
61. Northeast Utilities
62. Northern Indiana Public Service Co.
63. Northern States Power Co.
64. Oglethorpe Electric Membership Corp.
65. Ohio Edison Co.
66. Omaha Public Power District
67. Pacific Gas & Electric Co.
68. Pacific Power & Light Co.
69. Pennsylvania Electric Co. (General Public Utilities Corp.)
70. Pennsylvania Power Co. (Ohio Edison Co.)
71. Pennsylvania Power & Light Co.
72. Philadelphia Electric Co.
73. Portland General Electric Co.
74. Potomac Electric Power Co. (Allegheny Power Systems, Inc.)
75. Power Authority of the State of New York
76. Public Service Co. of Colorado
77. Public Service Co. of Indiana
78. Public Service Co. of New Hampshire
79. Public Service Co. of New Mexico
80. Public Service Co. of Oklahoma (Central & South West Corp.)
81. Public Service Electric & Gas Co.
82. Puerto Rico Water Resources Authority
83. Puget Sound Power & Light Co.
84. Rochester Gas and Electric Corp.
85. Sacramento Municipal Utility District
86. Salt River Project
87. San Diego Gas & Electric Co.
88. South Carolina Public Service Authority
89. Southern California Edison Co.
90. South Texas Project Electric Generating Station
91. Tennessee Valley Authority
92. Texas Electric Service Co. (Texas Utilities Co.)
93. Texas Power & Light Co. (Texas Utilities Co.)

94. Texas Utilities Generating Co. (Texas Utilities Co.)
95. Toledo Edison Co.
96. Union Electric Co.
97. United Illuminating Co.
98. Vermont Yankee Nuclear Power Corp.
99. Virginia Electric & Power Co.
100. Washington Public Power Supply System
101. Washington Water Power Co.
102. Western Massachusetts Electric Co. (Northeast Utilities)
103. Wisconsin Electric Power Co.
104. Wisconsin Michigan Power Co. (Wisconsin Electric Power Co.)
105. Wisconsin Power & Light Co.
106. Wisconsin Public Service Corp.
107. Yankee Atomic Electric Co.
108. Nuclear Engineering Co., Inc.
109. Chem-Nuclear Systems, Inc.

The companies listed are those having or seeking licenses for nuclear power generating stations and waste disposal licenses. In addition, there are thousands of other types of Nuclear Regulatory Commission licenses and companies seeking generic approvals which are subject to various fees unless specifically exempted by the regulation. Such companies will be affected by the outcome of this proceeding as to the fees which will be charged or refunded.

TROY B. CONNER, JR.
Counsel for Petitioners

APPENDIX B

MISSISSIPPI POWER & LIGHT CO., Offshore Power Systems, and Florida Power & Light Co., Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents.

NUCLEAR ENGINEERING CO., INC., Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents.

CHEM-NUCLEAR SYSTEMS, INC., a Washington corporation, Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents.

Nos. 78-1565, 78-1871 and 78-2200.

United States Court of Appeals, Fifth Circuit.

Aug. 24, 1979.

Before GEWIN, HILL and FAY, Circuit Judges.
JAMES C. HILL, Circuit Judge.

Appellants seek review of a licensing fee schedule adopted by the Nuclear Regulatory Commission (NRC) on February 9, 1978. In reviewing the fee schedule we must decide whether the charges assessed by the agency may properly be classified as "fees," or branded as unconstitutional "taxes." After careful examination of the assessments levied by the agency, we conclude that the fee schedule should be upheld.

I.

On August 10, 1973, the Atomic Energy Commission (AEC), the predecessor of the NRC, adopted a fee schedule designed to recover the costs for processing applications, permits and licenses as well as the costs arising from health and safety inspections and statutorily mandated environmental and antitrust reviews.

On March 4, 1974, the Supreme Court decided two cases in which fees charged by the Federal Communications Commission (FCC) and the Federal Power Commission (FPC) were successfully challenged. *National Cable Television Association, Inc. v. United States*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974); *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974). In these two decisions, the Court for the first time construed Title V of the Independent Offices Appropriation Act (IOAA), 31 U.S.C.A. § 483a,[1] the statutory provision permitting federal agencies to charge fees. The court construed the Act to allow fees only for special benefits rendered to identifiable recipients; these fees were to be measured by the "value to the recipient" of the agency service.

[1] § 483a. Services as self-sustaining; uniformity; regulations; deposit in Treasury; effect on other laws

It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price; *Provided further*, That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculating of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of such fee, charge or price.

In response to these two decisions, a petition for rulemaking was filed on May 2, 1974, by the petitioners herein and others, requesting the Commission to amend its 1973 fee schedule to comply with the Supreme Court decisions. The petitioners suggested that the Commission could not recover more than five percent of its licensing costs because at least 95 percent of the regulatory costs of the Commission's licensing activities benefited the public rather than the applicant.

On November 11, 1974, the AEC published for comment proposed revisions to the fee schedule that differed from the petitioner's recommended schedule. While the Commission was considering the comments on the proposed schedule, the Court of Appeals for the District of Columbia handed down four opinions on December 16, 1976, invalidating portions of the license fee schedule promulgated by the Federal Communications Commission.[2]

[2] *National Cable Television Association, Inc. v. F.C.C.*, 180 U.S. App.D.C. 235, 554 F.2d 1094 (1976); *National Association of Broadcasters v. F.C.C.*, 180 U.S.App.D.C. 259, 554 F.2d 1118

Using these decisions to provide additional guidance, the Commission on May 2, 1977, issued a new proposed notice of rulemaking. After receiving public comments, the Commission revised the rule to incorporate these comments and published a final rule on February 21, 1978.

Using the two Supreme Court decisions and the four opinions issued by the District of Columbia Circuit as a framework for analysis, the NRC devised a set of guidelines from which to structure the fee schedule.[3] Based on

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(1976); *Electronic Industries Association v. F.C.C.*, 180 U.S.App. D.C. 250, 544 F.2d 1109 (1976); *Capital Cities Communications, Inc. v. F.C.C.*, 180 U.S.App.D.C. 276, 554 F.2d 1135 (1976).

[3] These guidelines were developed by the NRC:

1. Fees may be assessed to persons who are identifiable recipients of 'special benefits' conferred by specifically identified activities of the NRC. The term 'specific benefits' includes services rendered at the request of a recipient and all services necessary for the issuance of a required permit, license, approval, or amendment, or other services necessary to assist a recipient in complying with statutory obligations or obligations under the Commission's regulations;

2. All direct and indirect costs incurred by the NRC in providing special benefits may be recovered by fees;

3. It is not necessary to allocate costs in proportion to the degree of public or private benefit resulting from conferring a special benefit on a recipient;

4. Where the identification of the specific beneficiary of NRC activity is obscure, the cost of the activity may not be included in the cost basis for fees;

5. A fee shall not exceed the sum on the average of the direct and indirect costs which the NRC incurs in furnishing the services for a member of the class of recipients for which the fee is assessed; and

6. Calculation of agency costs shall be performed as accurately as is reasonable and practical, and shall be based on specific expenses identified to the smallest practical unit associated with the rendering of the type of agency service to the particular class of recipients.

these guidelines, the NRC analyzed the functions performed and services rendered by each NRC office to determine which activities, if any, provided special benefits to applicants, licensees or permittees. After determining which of these services constituted special benefits, the NRC calculated the cost of providing this service, a cost which included professional manpower costs, overhead support and contractual services costs.[4] Under the fee schedule adopted by the Commission, approximately eighty percent of the Commission's budgeted regulatory costs in Fiscal Year 1977 were excluded from consideration for recovery. These excluded costs include agency activities which, in the Commission's view, either do not provide special benefits to identifiable recipients, or represent agency programs providing an independent public benefit, such as rulemaking proceedings. Under this revised schedule, the NRC estimated that it would recover approximately $30 million of its Fiscal Year 1978 budget and approximately $20 million of its Fiscal Year 1979 budget.

II.

[1] The petitioners' first argument is a blunderbuss shot aimed at the entire fee schedule itself. Reduced to its simplest form, the petitioners' argument is that the NRC is without authority to assess *any fee* against an applicant, since all of the Commission's activities are "in the public interest"; therefore, any charge assessed must necessarily be a "tax" and not a "fee." This proposition is grounded upon the petitioners' interpretation of *National Cable Television Association, Inc. v. United States*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974) (National Cable) and *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974) (New

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[4] A full description of how these fees were devised is contained in the final rule itself. 43 Fed. Reg. 7210-7217.

England Power). Because these two decisions constitute the starting point for any analysis in this area, we review them briefly.

In *National Cable*, the Court dealt with a challenge to the fee schedule established by the Federal Communications Commission. The FCC had sought to recoup its entire cost of regulating cable television systems by imposing a fee on regulatees, calculated on the basis of the number of subscribers to a particular cable system. In striking down the FCC's fee schedule, the Court narrowly construed Title V of the Independent Offices Appropriation Act (IOAA), 31 U.S.C.A. § 483a.[5] Title V of the IOAA permits federal agencies to charge persons for work or services provided to them. Broadly construed, the IOAA could have been interpreted to permit federal agencies to recoup their entire cost of regulating, a result which would offend the constitutional mandate that only Congress has the "Power to levy and collect Taxes." To avoid such constitutional problems, Justice Douglas construed the IOAA to permit federal agencies to charge fees but not to levy taxes. The Court then carefully proceeded to characterize a "fee." First, a fee "is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." 415 U.S. at 340, 94 S.Ct. at 1149. Second, a fee represents a charge for services which bestow a benefit on an applicant not shared by other members of society. Thus, an agency may not charge for protective services rendered to the general public. The statutory phrase "value to the recipient" was found by the Court to be the measure of the authorized fee.

In *New England Power* the Court dealt with a simple challenge to the fee schedule of the FPC in which the Commission attempted to recoup the entire cost of administer-

[5] *See* note 1, *supra*.

ing the Natural Gas and Federal Power Acts by assessing fees based on the amount of electricity or natural gas sold by a regulated utility company in interstate commerce. In striking down the FPC's fee schedule the Court again emphasized that a "fee" usually presupposes an application by a person or company for a service; thus the Court summarily rejected the Commission's position that general benefits redounding to regulated industries justify the imposition of fees against whole industries. Indeed, the IOAA was interpreted to allow only specific charges for specific services rendered to identifiable recipients. The Court quoted approvingly from a Bureau of the Budget Circular,[6]

[6] Budget Circular No. A-25 (J. App. 129-34) was issued on September 23, 1959. The circular provides in part:

> 3. General policy. A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.
>
> a. Special services.
>
> (1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:
>
> (a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e. g., receiving a patent, crop insurance, or a license to carry on a specific business); or
>
> (b) Provides business stability or assures public confidence in the business activity of the beneficiary (e. g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or
>
> (c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general

holding that "no charge should be made for services rendered, 'when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public.' " 415 U.S. at 350, 94 S.Ct. at 1154.

The petitioners' contention is that the work of the NRC benefits the general public solely and that the conferral of a license or permit does not bestow upon them any special benefit whatsoever; therefore, they argue, the NRC is without authority to assess *any* fee. In this connection we are reminded that "public safety is the first, last, and a permanent consideration in any decision on the issuance of a construction permit or a license to operate a nuclear facility." *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers,* 367 U.S. 396, 402, 81 S.Ct. 1529, 1532, 6 L.Ed.2d 924 (1961).

We reject such an argument because it ignores the realities of the operation of the nuclear power industry and is inconsistent with the interpretation given the IOAA by the Supreme Court. In *National Cable* the Court recognized the authority of the FCC to assess a fee even though "the main function of the Commission is to safeguard the public interest." 415 U.S. at 341, 94 S.Ct. at 1149. The Court thus acknowledged the FCC's authority to assess against applicants a fee for services rendered notwithstanding the strong public interest served in providing the service; what the Court found objectionable in the FCC's fee schedule was the agency's attempt to recover the entire cost of regulating. There is no contention that the NRC has attempted to do this with its present schedule.

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public (e. g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e. g., licensing of new biological products).

The Petitioners contend that *National Cable* is distinguishable in that the FCC provides a true benefit to licensees, while the NRC's grant of a license confers no benefit upon an applicant. Because of the limited number of broadcast frequencies, a licensee of the FCC receives a valuable privilege and is protected against interference from competing stations;[7] a licensee of the NRC receives no such benefit, it is urged, since anyone with sufficient capital and initiative can construct and operate a nuclear reactor, fuel reprocessing plant or waste disposal facility. This kind of argument has been previously rejected, *see National Cable Television Association, Inc. v. F.C.C.,* 180 U.S.App.D.C. 235, 554 F.2d 1094 (1976). In answering the argument put forth by cable television operators that they receive no benefit from an FCC license because the cable television industry would have developed better without FCC regulation, the District of Columbia Circuit had this to say: "All that may be true, but these distinctions have no relevance here. The fact is that the FCC has undertaken to regulate this industry and has so far been sustained by the Supreme Court in this endeavor, with the result that a certificate of compliance *has* become a necessary and therefore valuable license." 180 U.S.App.D.C. at 242-43, 554 F.2d at 1101-02. So too, here. A license from the NRC is an absolute prerequisite to operating a nuclear facility, and as such, is a benefit "not shared by other members of society."[8] Aside

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[7] In *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 101, 93 S.Ct. 2080, 2086, 36 L.Ed.2d 772 (1973), the Court said:

> Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated.

[8] We have no doubt that this was the result intended by the Congress and approved by the Supreme Court in *National Cable* and *New England Power.* As the Supreme Court said in *National*

from the benefit of being able to operate a business, however, the petitioners are recipients of other benefits flowing from the grant of a license or permit. One such benefit is the limitation on liability afforded by the Price-Anderson Act, 42 U.S.C.A. § 2210, a boon which almost all licensees are entitled to receive.[9] Moreover, we feel quite certain that the routine inspections conducted by the NRC could uncover hazardous conditions which, if allowed to continue, would jeopardize the safe operation of a licensee's facility. In short, we are not impressed by the petitioners' argument that they receive no benefit from the conferral of an NRC license. Even so, to accept petitioners' argument would mean that *no* federal agency could assess any fees, since all public agencies are constituted in the public interest. We therefore hold that the NRC has full authority to assess fees against applicants. Whether the Commission has properly assessed those fees is an entirely different matter, one to which we now turn.

III.

[2] Having failed to shoot down the entire fee schedule, the petitioners next take a more precise aim, hoping to invalidate selected portions of the schedule. As an alternative argument, the petitioners concede that the Commission may

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Cable: "A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society." 415 U.S. at 341, 94 S.Ct. at 1149.

[9] The protections of the Price-Anderson Act are fully explained in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). We are aware that a licensee must pay for financial protection up to the liability ceiling, but the limitation on liability is nonetheless an important benefit accruing to the licensee.

assess fees, but nonetheless assert that certain fees contained in the schedule are improper. Specifically, the petitioners insist that some public benefit inheres in every service provided by the NRC, and that the agency should exclude from its fees that portion of the agency service which represents the benefit inhering to the public. This proposed allocation requirement is the basis for most of the petitioner's objections to specific items included in the fee schedule.

The Commission, of course, does not agree. It takes the position that it is not required to segregate public and private benefits and that it may recover the *full cost* of providing a service to a private beneficiary, regardless of whether that service may also benefit the public. We agree with the Commission.

Our position is consistent with the view of the IOAA taken by the Supreme Court in *New England Power*. There, the Court cited with approval a 1959 Bureau of the Budget Circular [10] which the Court felt represented a proper construction of the IOAA. In interpreting the Act, the Bureau opined: "Where a service (or privilege) provides special benefits to an indentifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed *to recover the full cost* to the Federal Government of rendering that service." (J. App. 130) (emphasis added). It is true, as the petitioners point out, that the Court in *National Cable* criticized the FCC for assessing fees based upon a formula contrived to reimburse the Commission for its total cost of supervision. But here, the NRC does not attempt to recoup all of its regulatory costs; [11] it seeks only

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[10] Other relevant portions of the Circular are set forth in note 6, *supra*.

[11] As we have mentioned before, at least eighty percent of the Commission's budgeted regulatory costs for Fiscal Year 1977 were excluded from consideration for recovery.

to recover the total cost of providing services to private beneficiaries.

The District of Columbia Circuit has also rejected the suggestion of an allocation requirement. In *Electronic Industries Association v. F.C.C.*, 180 U.S.App.D.C. 250, 554 F.2d 1109 (1976), the Court found that the FCC was not prohibited from charging an applicant for the *full cost* of rendering services to him, even though some incidental public benefit might flow from the service provided.[12]

In addition to being supported by persuasive if not controlling precedent, this approach comports with the clear legislative intent that agency services be "self-sustaining to the full extent possible." 31 U.S.C.A. § 483a. To impose the petitioners' allocation requirement would saddle agencies with the impossible task of sorting out public from private benefits, with the likely result that most agency fees would be reduced to mere tokens. In conclusion, we hold that the NRC may recover the *full cost* of providing a service to an identifiable beneficiary, regardless of the incidental public benefits flowing from the provision of that service.

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[12] The Court quoted with approval the FCC's unequivocal rejection of an allocation requirement.

> It is our view that the Commission is authorized to charge fees for those services that provide a value to identifiable recipients, which we have identified as activities associated with processing of applications that provide authorization for individuals, for example, to operate radio transmitters, or sell radio equipment, or collect common carrier charges. The fact that the general public may also benefit by Commission authorization of such activities, in that the activities may directly or indirectly provide a service to the public, does not limit the Commission's authority to charge a fee to the recipients of the services that will allow those services provided by the Commission to be operated on a self-sustaining basis as mandated in Title V. 48 F.C.C.2d 402, 404 (1974).

180 U.S.App.D.C. at 255, 554 F.2d at 1114 n.12.

[3] Having cast aside the allocation requirement, we now examine the propriety of the specific fees assessed by the Commission. Before doing so, however, we wish to summarize the characteristics of those items properly assessed as fees. First, no fee may be charged to a private party when there is no identifiable beneficiary, i. e., "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." [13] Second, the fee assessed cannot exceed the cost to the agency of rendering the service. *Electronic Industries Association v. F.C.C.*, 180 U.S.App.D.C. 250, 255, 554 F.2d 1109, 1114 (1976). Finally, expenses incurred to serve some "*independent* public interest" cannot be included in the fee, although, as we have already concluded, the agency may recover the full cost of rendering a service to a private beneficiary. 180 U.S.App.D.C. at 256, 554 F.2d at 1115.

[4] The petitioners first challenge the charges assessed by the NRC for routine inspections, arguing that such inspections constitute protective services rendered for the benefit of the general public. Although we are certain that the public benefits from routine inspections which protect the health and safety of the general populace, these inspections are nonetheless needed to assure a licensee's compliance with the Atomic Energy Act and with Commission regulations necessary for retention of the license.[14] An applicant before the NRC must meet certain requirements as a prerequisite to obtaining a license; likewise, a licensee must comply with certain statutory and regulatory requirements in order to maintain his license. By complying with these requirements, an applicant is able to obtain and keep his license; as we have previously discussed, the receipt and

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[13] *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 350, 94 S.Ct. 1151, 1134, 39 L.Ed.2d 383 (1974), *quoting* Bureau of the Budget Circular A-25, Sept. 23, 1959.

[14] *See* 42 U.S.C.A. § 2201(*o*); C.F.R. §§ 50-70 (1978).

retention of the license is of unquestionable benefit to the applicant. In conducting routine inspections, the Commission provides a service to the licensee by assisting him in complying with those statutory and regulatory requirements necessary for retention of his license. *Electronic Industries Association* v. *F.C.C.*, 180 U.S.App.D.C. 250, 256, 554 F.2d 1109, 1115 (1976). We hold that the Commission may properly assess a fee for the cost of providing this service.

[5, 6] Next, the petitioners question the authority of the NRC to charge for the costs incurred in conducting environmental reviews required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. § 4321. We uphold the Commission's authority to charge a fee for such reviews because they are a prerequisite to the issuance of a license.[15] It matters not that the legal obligation of preparing environmental impact statements rests with the NRC; nor is the Commission's authority to assess such fees undercut by the obvious public benefit flowing from the preparation of these environmental reviews. The Commission must conduct these reviews before it can issue a license to an applicant; it is a necessary part of the cost of providing a special benefit to the licensee. In other words, it is "incident to a voluntary act." [16] Because the Commission may recoup the *full cost* of conferring a special benefit, it may recover its costs for conducting environmental reviews.[17]

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[15] *See* 42 U.S.C.A. § 4332(C).

[16] *National Cable Television Association, Inc. v. United States*, 415 U.S. 336, 340, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974).

[17] *But see Public Service Co. v. Andrus*, 433 F.Supp. 144 (D. Colo. 1977). An illustrative contrast to a NEPA statement prepared in connection with an individual license would be a programmatic NEPA statement prepared by the Commission on its own instigation in support of a general agency program expected to have significant benefit both for the public and for private recipients as yet unidentified. *See, e. g.*, the Commission's Draft Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel. NUREG-0404, March, 1978. Such a statement creates an "independent public benefit" in the sense used by the District of Columbia Circuit in *Electronic Industries Association v. F.C.C.*, 180 U.S.App.D.C. 250, 256, 554 F.2d 1109, 1115 (1976). Costs of such generic activities are excluded from the Commission's fees.

[7, 8] The petitioners also object to the inclusion in the fee schedule of the costs of uncontested hearings. We believe this charge is proper. Section 189(a) of the Atomic Energy Act, 42 U.S.C.A. § 2239(a), requires the Commission to hold a public hearing before it may issue a construction permit for a nuclear reactor. Uncontested hearings are those in which there is no controversy between the NRC staff and the applicant and no intervention has taken place. *See* 10 C.F.R. § 2.4(n) (1978). These hearings are an integral part of the process of approving an applicant's license and are required by the Atomic Energy Act itself. Because these costs are necessarily incurred by the agency in providing a service to the applicant, they should be assessed against the applicant.[18] *Electronic Industries Association v. F.C.C.*, 180 U.S.App.D.C. 50, 258 n. 17, 554 F.2d 1109, 1117 n. 17 (1976).

[9] We cannot agree with the petitioners that expenses of the trial staff in uncontested hearings should be excluded from recovery because the trial staff represents an independent public interest. *See Electronic Industries Association v. F.C.C.*, 180 U.S.App.D.C. 250, 554 F.2d 1109 (1976). Unlike a contested proceeding, the presiding officer in an

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[18] We do not agree with the petitioners that the Commission's decision to exclude the costs of contested hearings from fee computation is arbitrary and capricious. In view of the difficulty in estimating in advance the costs of such proceedings, we believe the Commission's decision to exclude these costs from recovery is a wise one, although we express no opinion as to whether expenses incurred in contested hearings might properly be charged to the applicant.

uncontested hearing simply reviews, without conducting a *de novo* review of the application, the NRC staff's prior conclusion that the applicant has complied with the terms of the Atomic Energy Act and is entitled to receive a license. 10 C.F.R. § 2.501(2) (1978). This review is in the nature of an internal check by the agency that the applicant has complied with the statute, and does not serve an independent public interest.[19]

The petitioners further object to being charged for administrative and technical support costs. The Commission's position is that these costs must be included in the fee schedule because they constitute part of the total cost of providing a service; the petitioners contend that such costs should be excluded because they represent general agency expenses which do not benefit an "identifiable recipient."

The cost of performing a service, such as granting a license to construct a nuclear reactor, involves a greater cost to the agency than merely the salary of the professional employee who reviews the application. The individual must be supplied working space, heating, lighting, telephone service and secretarial support. Arrangements must be made so that he is hired, paid on a regular basis and provided specialized training courses. These and other costs such as depreciation and interest on plant and capital equipment are all necessarily incurred in the process of reviewing an application. Without these supporting services, professional employees could not perform the services requested by applicants.

[10] Such costs may be assessed against an applicant as part of the total cost of processing and approving a license;

[19] We do not believe that our conclusion is at odds with the statement of the *Electronic Industries* court, 180 U.S.App.D.C. at 258 n. 17, 554 F.2d at 1117 n. 17, that in some hearings the trial staff "presumably represents an independent public interest," since the court specifically recognized that its conclusion would depend upon the particular agency and type of hearing involved.

we emphasize again that the Commission may recover the *full cost* of providing a service to a beneficiary. Indeed, the IOAA itself urges federal agencies to assess fees taking into consideration both the "direct and indirect cost to the Government." 31 U.S.C.A. § 483a. Here, the Commission has carefully and thoroughly explained its method of calculating these administrative and technical support costs.[20] We find the Commission's formula to be a reasonable method of estimating such fees. Notwithstanding the petitioners' assertions to the contrary, the NRC in estimating its costs is only obligated to come forth with reasonable approximations, not precise calculations. *National Association of Broadcasters v. F.C.C.*, 180 U.S.App.D.C. 259, 271 n. 28, 554 F.2d 1118, 1130 n. 28 (1976).

[11] Finally, the petitioners attack the Commission's assessment of a fee for renewing a license to operate a low-level radioactive waste burial site. First, it is argued that the Commission acted arbitrarily when, in assessing its fees, it failed to distinguish between those licensees operating in "agreement" versus "non-agreement" states. An agreement state is one which has entered into an effective agreement with the NRC under Section 274(b) of the Atomic Energy Act, 42 U.S.C.A. § 2021(b), which authorizes the state to license specified radioactive materials. The

[20] A detailed description of how these fees are calculated is set forth in 42 Fed.Reg. 22149, 22158. In brief, the actual fee for a specific service is computed by multiplying the average professional manpower required (calculated in terms of man-hours or man-years) to perform the service times the professional man-year or man-hour rate (the cost per year or hour to maintain a professional employee), and then adding to that product the average share of the costs of the contractual support services. (A contractual support service is a service contracted for by the NRC to assist it in the review of applications, permits and licenses; approval of amendments; and performance of inspections.) This method of calculation ensures that only the overhead and technical support costs associated with the provision of special benefits are included in the Commission's fee schedule.

agreement state licenses all radioactive wastes except the special nuclear material over which the Commission must retain exclusive jurisdiction because of the quantity of the material involved. For companies operating waste disposal sites in an agreement state, then, a license must be obtained from both the state and the NRC. The petitioners contend that the NRC should reduce its fee for license renewal for those companies operating sites in agreement states because those states handle the bulk of the regulatory responsibilities with respect to radioactive waste disposal. We reject the petitioners' contention that dual regulatory responsibilities should have any impact upon fee assessment. Whether the state or the Commission bears the burden of regulating is not relevant, since the cost of regulation cannot be recovered under the Commission's fee schedule. A company operating a waste disposal site in an agreement state must of necessity obtain a license from the NRC, and the Commission is entitled to recover the full cost of conferring that benefit. *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974); *Electronic Industries Association v. F.C.C.*, 180 U.S.App. D.C. 250, 554 F.2d 1109 (1976).

[12] Second, the petitioners contend that the renewal fee set by the Commission is unsupported in the record and is unreasonably high. We cannot agree. We find the Commission's figures to be a good faith estimate of the costs of renewing a waste disposal license. To the extent that the fee exceeds the actual costs of renewal, the Commission will refund the difference to the licensee.[21] Certainly we cannot

[21] The petitioners also object to the NRC's refund policy, labelling it "vague and uncertain." We find the Commission's refund procedure to be clear and precise. It is the Commission's practice to recover the entire renewal fee at the time the application is filed with the Commission. 10 C.F.R. § 170.12(d)(1978). Due to the Commission's limited experience in renewing waste disposal licenses, its estimate of the costs of renewal will necessarily not be as precise as other calculations made by the Commission where it has had more experience. Even so, after the Commission has completed its review of a renewal application, it will examine computer printouts to ascertain the exact cost of providing this service. If the costs exceed the amount of the renewal fee, no additional charge will be assessed. If actual costs are less than the fee, the difference will be refunded. We do not find this procedure to be an abuse of agency discretion or arbitrary and capricious. To the extent that the requirement of full payment at the time of application proves burdensome, an applicant may avail himself of the waiver procedure under 10 C.F.R. § 170.11(b) (1978).

say that the Commission's fees are arbitrary or capricious. Thus, the fee charged for the renewal of waste disposal licenses is proper.

IV.

In summary, we hold that the Commission has the authority to recover the *full cost* of providing services to identifiable beneficiaries. We uphold the fee promulgated by the Commission as being consistent with this principle. We have examined the remaining contentions of the petitioners and find them to be without merit.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

C 76-287

ALUMET, *Plaintiff*,

v.

CECIL D. ANDRUS, CURTIS J. BERKLAND, PAUL HOWARD, and the UNITED STATES OF AMERICA, *Defendants*.

Order Granting Plaintiff's Motion for Summary Judgment

This case involves a dispute over the validity and application of certain regulations adopted by the Secretary of the Interior [Secretary]. These regulations, 43 C.F.R. § 2802.1-2 (1975) [hereinafter reimbursement regulations], permit the Bureau of Land Management [BLM] to obtain reimbursement for administrative and other costs incurred in processing applications for rights-of-way across federal lands for power lines, railroad spurs, water pipelines, etc. See 43 U.S.C. § 959 & § 961.

In connection with the proposed development of an alunite mine and processing plant in Beaver County, Utah, plaintiff applied for certain rights-of-way. Defendants, upon the recommendation of the Utah State office of the BLM, undertook preparation of an environmental statement [EIS] of the entire alunite project in accordance with the terms of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq*. Defendants have undertaken to act upon plaintiff's right-of-way applications but have conditioned such action upon reimbursement to defendants by plaintiff of all costs incurred in processing the applications, including the cost of the EIS. Plaintiff has also been billed for "indirect costs" incurred in processing the applications.

Plaintiff brought this action challenging the reimbursement regulations and requests declaratory and injunctive relief. Both parties subsequently filed motions for summary judgment requesting that the court determine the validity of the regulations. The issues have been extensively briefed in supporting and reply memoranda filed by both parties and at oral argument before the court.

Plaintiff attacks the reimbursement regulations on two grounds. First, they do not apply to the alunite project, a minerals project and hence any costs incurred in connection with the drafting of an EIS on the entire project are not subject to reimbursement under the regulations. Second, the reimbursement regulations and the reimbursement demands pursuant thereto are unlawful and invalid because they exceed the statutory authority upon which they are based. Defendants argue that the regulations are valid and were adopted pursuant to proper statutory authority and that the preparation of an EIS was a necessary expense in connection with processing the right-of-way applications.

The validity of the reimbursement regulation rests on the claimed statutory basis pursuant to which they were adopted. They are based on the policy expressed in three acts of Congress: The Independent Offices Appropriation Act [IOAA], 31 U.S.C. § 483a; the Public Land Administration Act [PLAA], 43 U.S.C. § 1371 & § 1374; and the 1973 amendments to the Mineral Leasing Act, 30 U.S.C. § 185(1).

Section 185(1) of the Mineral Leasing Act applies only to oil and gas pipelines. Since the rights-of-way at issue are not for oil or gas pipelines, it is clear that the Mineral Leasing Act is not a proper basis for the reimbursement regulations. It is apparent that § 204a of the PLAA, 43 U.S.C. § 1374 is not a proper basis for the regulations since it deals only with refunds for overpayments made by applicants. It is manifest to the court, however, that § 201 of the PLAA, 43 U.S.C. § 1371 and the IOAA, 31 U.S.C. § 483a do provide a proper basis for some type of reimbursement

regulation. It is likewise apparent that the application of the regulations at issue here exceed the statutory authority claimed.

Section 201 of the PLAA, 43 U.S.C. § 1371 provides in part:

> Notwithstanding any other provision of law, the Secretary of the Interior may establish reasonable filing fees, service fees and charges, and commissions with respect to applications and other documents relating to public lands and their resources under his jurisdiction, and may charge and abolish such fees, charges, and commissions.

A superficial examination of the statute appears to support the reimbursement regulations. However, as Judge Finesilver has noted in construing the same regulations:

> The force of the language [of 43 U.S.C. § 1371] is diminished . . . when one consults the legislative history of the statute. . . . The Legislature's understanding of Section 201 is partially revealed in . . . 2 U.S. Code Cong. and Admin. News p. 3147 (1960).

There a letter from Roger Ernst, Assistant Secretary of the Interior, was reproduced, which indicated the anticipated effect of Section 201. Mr. Ernst indicated that the bill involved only five percent of the business volume covered by BLM fees. He also noted that "receipts from fees, etc., accruing to the Bureau approximate $1 million annually. It is estimated that this bill, if enacted, will increase these receipts by approximately $50,000 annually."

• • • •

The Senate understanding of Section 201 was obviously intended to allow the Secretary some flexibility in setting fees for services rendered for the primary benefit of the requesting individual. *Nonetheless, it can hardly be maintained that the Senate intended to*

> *thereby allow the Secretary to impose fees ranging into the tens and hundreds of thousands of dollars such as those imposed in this case.*

Public Service Co. of Colorado v. *Andrus*, 433 F. Supp. 144, 149-50 (D.C. Colo. 1977). The House of Representatives apparently had a similar understanding of the scope and impact of § 201.

Defendants also argue that the IOAA authorizes the reimbursement regulation. Essentially the IOAA, 31 U.S.C. § 483a provides that federal agencies "shall be self-sustaining to the full extent possible. . ."

The Supreme Court has recently examined the intent and scope of § 483a and found that it does authorize the imposition of fees by federal agencies. *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974). The Court, however, narrowly limited the scope of the IOAA. The Court stated:

> The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. It would be a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U.S.C. § 482a narrowly as authorizing not a "tax" but a "fee." A "fee" connotes a "benefit" and the Act by its use of the standard "value to the recipient" carries that connotation.

The Court stated that the proper standard for determining what fees should be charged is the "value to the recipient." *Id.* at 344. In a companion case the Court stated:

> It is true that the Act includes services rendered "to or for any person (including groups . . .)." But if we are to construe the Act to cover only "fees" and not

"taxes"—as we held should be done in the *National Cable Television* case, *ante*, P. 336—the "fee" presupposes an application whether by a single company or by a group of companies. The Office of Management and Budget (then known as the Bureau of the Budget) issued a circular in 1959 construing the Act. That circular stated that a reasonable charge "should be made to each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit." (Emphasis added.) The circular also states that no charge should be made for services rendered, "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public."

We believe that is the proper construction of the Act.

Federal Power Commission v. New England Power Co., 415 U.S. 345, 349-51 (1974). (Citations omitted, emphasis in original.)

Defendants also argue that the reimbursement regulation is authorized by the Federal Land Policy and Management Act of 1976 [FLPMA], 43 U.S.C. § 1701 *et seq.* The FLPMA provides that the Secretary of the Interior may promulgate regulations requiring reimbursement "for all reasonable administrative and other costs incurred in processing an application for such right-of-way. . . ." 43 U.S.C. § 1764(g). The FLPMA further provides that:

> As used in this section "reasonable costs" include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value

> of the rights or privileges sought by the applicant, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

43 U.S.C. § 1734(b).

While this language provides something less than a precise guideline, the intent of the provision appears to be that "reasonable costs" should be determined on a benefit to the applicant basis. The court concludes that "reasonable costs" assessed pursuant to the FLPMA are subject to the analysis adopted by the Supreme Court in construing the IOAA in *National Cable, supra,* and *New England Power, supra.*

Plaintiff argues that there can be no requirement of reimbursement of costs after October 21, 1976, the effective date of the FLPMA, since the enactment of the FLPMA revokes all prior legislation dealing with right-of-way applications. This is so plaintiff argues, because the Secretary has not yet promulgated regulations regarding right-of-way applications. The FLPMA, however, provides that "[p]rior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the fullest extent possible." 43 U.S.C. § 1740. The legislative intent is clear and the court sees no compelling reason to depart therefrom.

It is proper, therefore, that the BLM may require fees in connection with applications for rights-of-way over federal lands where a "service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large. . . ." *Public Service Company, supra* at 151.

Defendants argue that the cost of the EIS is properly reimbursable under the reimbursement regulation since the right-of-way applications could not be processed without an EIS on the whole alunite project. As Judge Finesilver noted "[s]uch reasoning . . . would permit an agency to charge for all services rendered to an applicant for a license or privilege, since presumably all services rendered are the result of the voluntary application for a right of way. . . . We reject this contention." *Public Service of Colorado* at 152-53. The court concurs in Judge Finesilver's statement that:

> The costs of environmental analyses and impact statements developed pursuant to the mandate of the National Environmental Policy Act are not of primary benefit to the right of way applicant, and thus cannot properly be charged as fees under either the Independent Offices Appropriation Act of 1952 . . . or the Public Land Administration Act. . . .

Public Service Company of Colorado, at 153.

The court also finds, notwithstanding the language in the FLPMA, 43 U.S.C. § 1764(g), that the cost of an EIS may constitute a "reasonable cost" under the Act, that other language in that same section providing that a factor in determining reasonable costs is whether "the cost incurred [is] for the benefit of the general public interest" precludes defendants from requiring reimbursement for the preparation of an EIS. This is so because the BLM undertook the preparation of the EIS in order to meet the requirements of NEPA, an Act passed by Congress manifestly for the benefit of the general public. But for NEPA, the BLM would not have undertaken such environmental studies. Such a cost falls within the Supreme Court's holding in *New England Power, supra,* that "no charge should be made for services rendered, where the identification of the ultimate beneficiary is obscure and the service can be considered primarily as benefiting broadly the general public." *Id.* at 350.

With respect to the other costs, such as administrative overhead plaintiff complains of, there can be no precise delineation of which costs are subject to reimbursement and which are not. The court is inclined to agree with the standard adopted in the *Public Service Company of Colorado* case.

> As a fee, the BLM must measure its reimbursement demands only by the actual costs to the agency. To include the ultimate value to the applicant in its consideration taints a reimbursement plan into a revenue scheme. In *National Cable Television Ass'n, Inc. v. F.C.C.,* 554 F.2d 1094 at 1107, the court observed:
>
> > [T]he agency must *not* look at the value which the regulated party may immediately or eventually derive from the regulatory scheme but at the value of the direct and indirect services which the agency confers. This means, for example, that a fee, in order not to be a tax, cannot be justified by the revenues received or the profits which cable operators have made from their franchises, but must be reasonably related to those attributable direct and indirect costs which the agency actually incurs in regulating (servicing) the industry.
>
> The Court was more direct in *National Ass'n of Broadcasters v. F.C.C., supra,* at 1129-1130 n. 28 "When the cost of the benefit conferred is exceeded by any material amount, one immediately gets into the taxing areas and the result is a revenue and not a fee." *It is the cost to the agency which determines the value to the recipient. The fee schedules should be structured accordingly.*

Id. at 153. (Emphasis added.) Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is denied and plaintiff's motion for summary judgment is granted in accordance with the above opinion. A judgment reflecting the court's order is filed in a separate document.

DATED this 7th day of March, 1978.

/s/ ALDON J. ANDERSON
Aldon J. Anderson
United States District Judge

APPENDIX D

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1546

ALUMET, *Appellee,*

v.

CECIL D. ANDRUS, et al., *Appellants.*

Appeal from the United States District Court for the District of Utah, Central Division (D.C. Civil Action No. C-76-287)

Filed Oct. 4, 1979

L. Charles Johnson (Johnson and Olson, on the brief), for Appellee.

Francis M. Shea (Richard T. Conway, James R. Bieke, Shea & Gardner; Bryant O'Donnell, James R. McCotter, Kelly, Stansfield & O'Donnell; Paul L. Jauergui; Richard D. Bach, Rives, Bonyhadi & Smith; William H. Coldiron, John W. Ross; John R. Bury, and Tom Gilfoy; on the brief), for Public Service Company of Colorado, Idaho Power Company, The Montana Power Company, Pacific Power & Light Company, and Southern California Edison Company, Amici Curiae in support of Appellee.

Peter R. Steenland, Jr. (and Neil T. Proto, Department of Justice; Sanford Sagalkin, Deputy Assistant Attorney General; and Paul Smyth, Office of the Solicitor, Department of the Interior.

Before MCWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is an appeal from a judgment which held that the Bureau of Land Management (BLM) does not have the authority to require a private party to reimburse BLM for *any* part of the cost of an environmental impact statement prepared in connection with the processing of an application for a right-of-way over public lands.

Alumet is a partnership and joint venture composed of three partners: National Steel, a Delaware corporation; Southmore, a Georgia corporation; and Earth Sciences, a Colorado corporation. Alumet is engaged in various mining operations in the States of Utah and Idaho. We are here concerned with a proposed 500 million dollar project undertaken by Alumet (the Alumet Project) involving development of an alunite mine, a processing plant complex and related rights-of-way in Beaver County, Utah, all on public lands belonging to the United States.

More specifically, in 1973 Alumet made application to BLM for preference right leases for approximately 14,000 acres, which included a proposal for mining and processing. At that time Alumet had not made any request for rights-of-way. In January, 1974, BLM determined that under the National Environmental Policy Act, 42 U.S.C. §4321, *et seq.*, an Environmental Impact Statement (EIS) had to be prepared. Although in the earlier stages of this dispute between Alumet and BLM there appears to have been some claim by BLM that it was entitled to reimbursement for the cost of preparing the EIS in connection with Alumet's lease application, such is not, however, a part of the present controversy. In this Court, BLM agrees that it is not entitled to any reimbursement for the cost of that part of the EIS relating to Alumet's overall lease application, but rather presently seeks reimbursement for only those EIS costs associated with the application for rights-of-way which would be used in connection with the proposed lease of federal lands.

On September 5, 1975, Alumet filed applications for rights-of-way through public land for power and communication facilities in Beaver County, Utah to be used in connection with the Alumet Project. These rights-of-way are necessary for the construction and operation of electrical transmission lines, water pipelines, and telephone lines in support of the mining operations. Following the filing of these applications, BLM made no "separate" decision to prepare an EIS. It was BLM's position that its previous decision to prepare an EIS for the Alumet Project encompassed the subsequent application for rights-of-way in that the requested rights-of-way were merely an extension of the total project. In any event, an EIS was prepared covering the entire Alumet Project, including the requested rights-of-way.[1] BLM demanded payments from Alumet which included, *inter alia*, the projected cost estimate of the EIS. Certain payments were made by Alumet under protest. Later Alumet brought the present declaratory judgment proceeding against the Secretary to determine which costs incurred by BLM, if any, could be properly charged against Alumet by way of a reimbursement claim.

As indicated earlier, BLM now makes no claim that it is entitled to reimbursement for the cost of the EIS relating to Alumet's overall lease applications. Rather, BLM appeals the judgment of the trial court which held that BLM had no right to reimbursement for *any* portion of the cost of the EIS prepared in connection with the processing of Alumet's application for rights-of-way.

Before considering the judgment of the trial court, reference to applicable statutes and agency regulations should serve to place the present controversy in context. Actually,

---

[1] At this time the Secretary has not made any final determination concerning EIS costs attributable only to the rights-of-way.

the starting point is the Constitution itself, Article IV, Section 3, clause 2, which provides as follows:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States.

Based on this constitutional authority, Congress enacted the Federal Land Policy Management Act (FLPMA). 43 U.S.C. § 1701, *et seq.* The effective date of that Act was October 21, 1976, at a time when Alumet's application for rights-of-way was pending before the BLM.

43 U.S.C. § 1764(g) provides as follows:

> § 1764. General requirements—Boundary specifications; criteria; temporary use of additional lands
>
> • • • •
>
> Rental payments; amount, waiver, etc.
>
> (g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: *Provided,* That when the annual rental is less than $100, the Secretary concerned may require advance payment for more than one year at a time: *Provided further,* That the Secretary concerned may waive rentals where a right-of-way is granted, issued, or renewed in reciprocation for a right-of-way conveyed to the United States in connection with a cooperative cost share program between the United States and the holder. *The Secretary concerned may, by regulation or prior to promulgation of such regulations, as a condition of a right-of-way, require an applicant for or holder of a right-of-way to reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such right-of-way and in inspection and monitoring of construction,*

> *operation, and termination of the facility pursuant to such right-of-way: Provided, however,* That the Secretary concerned need not secure reimbursement in any situation where there is in existence a cooperative cost share right-of-way program between the United States and the holder of a right-of-way. (Emphasis added.)

43 U.S.C. § 1734(b) provides as follows:

> § 1734. Fees, charges, and commissions—Authority to establish and modify.
>
> • • • •
>
> Deposits for payments to reimburse reasonable costs of United States
>
> (b) The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. The moneys received for reasonable costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended. *As used in this section "reasonable costs" include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities.* In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the government processing involved, *that portion of the costs incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant,* the public service provided, and other factors relevant to determining the reasonableness of the costs. (Emphasis added.)

43 U.S.C. § 1740 provides as follows:

§ 1740. Rules and regulations

The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands, and the Secretary of Agriculture, with respect to lands within the National Forest System, shall promulgate rules and regulations to carry out the purposes of this Act. The promulgation of such rules and regulations shall be governed by the provisions of chapter 5 of Title 5, without regard to section 553(a)(2). *Prior to the promulgation of such rules and regulations, such lands shall be administered under existing rules and regulations concerning such lands to the extent practical.* (Emphasis added.)

The Secretary in 1975 promulgated the following regulation which now appears as 43 C.F.R. § 2802.1-2:

§ 2802.1-2 Reimbursement of costs.

(a)(1) An applicant for a right-of-way or a permit incident to a right-of-way shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act (42 U.S.C. 4321-4347), before the right-of-way or permit will be issued under the regulations of this part.

Shortly after the enactment of FLPMA, Secretarial Order No. 3011 was issued (42 Fed. Reg. 55280) which provides as follows:

Sec. 1 *Purpose.* The purpose of this Order is to implement the cost recovery provisions of FLPMA, Sections 304 and 504(g), 43 U.S.C. 1734, 1764(g) (Supp.

1977), as to applications for monitoring of rights-of-way over the public lands.

Sec. 2 *Implementation.* * * * The regulations at 43 C.F.R. 2802.1-2 (1976) shall be applicable to such applications or holder monitoring activity until new regulations implementing Title V of FLPMA become final. It is my finding that "reasonable costs" under Sections 304 of FLPMA for processing applications for rights-of-way over public lands and for monitoring right-of-way holder activity, are the actual costs incurred by the United States in performing statutory responsibilities necessitated by such applications or rights-of-way. The term "reasonable costs" means the same as the term "administrative and other costs" as used in the regulations at 43 C.F.R. 2802.1-2 (a)(1) (1976), and includes costs incurred in preparation of environmental impact statements.

Sec. 7 *Effective Date.* This Order is effective immediately. Its provisions shall remain in effect until regulations are promulgated implementing Title V of FLPMA, or until it is amended, superseded, or revoked, whichever occurs first.

In the order granting Alumet's motion for summary judgment, the trial court first rejected BLM's argument that 43 C.F.R. § 2802.1-2, which provides that the Secretary may seek reimbursement for costs incurred by BLM in the processing of an application for a right-of-way, including the costs of preparing an EIS, before any right-of-way be issued, was a valid exercise of agency authority under three prior acts of Congress, namely, (1) The Independent Offices Appropriation Act, 31 U.S.C. § 483(a); (2) the Public Land Administration Act, 43 U.S.C. § 1371 and § 1374; and (3) the 1973 amendments to the Mineral Leasing Act,

30 U.S.C. § 185(1).[2] In this Court BLM has abandoned any reliance on those three Acts and relies totally on FLPMA.

In the order granting Alumet's motion for summary judgment, the trial court considered, and rejected, the argument that, under FLPMA, BLM was entitled to reimbursement from Alumet for the cost of preparing the EIS as it pertained to the processing of Alumet's application for rights-of-way, and the court held that *no* part of such expense could be charged to Alumet. In so holding we conclude the trial judge erred.

As concerns the applicability of FLPMA to the present case, the trial judge rejected Alumet's argument that the enactment of FLPMA in a sense "repealed" all prior legislation and regulations dealing with right-of-way applications, and that accordingly, there were *no* rules regarding costs and reimbursement therefor since the Secretary had not thereafter promulgated new regulations regarding right-of-way applications. In this regard the trial judge noted that 43 U.S.C. § 1740 provided that prior to the promulgation of any new rules or regulations, public lands should be administered under existing rules and regulations to the fullest extent possible. The trial judge observed that "the legislative intent is clear and the court sees no compelling reason to depart therefrom." We agree.

After holding that FLPMA was applicable to the present case, the trial judge went on to conclude, however, that notwithstanding the fact that § 1734(b) of FLPMA provides that reasonable costs, including the cost of preparing an EIS may be charged against an applicant for a right-of-way, nonetheless *no* part of the cost incurred by BLM in preparing the EIS in connection with the processing of

[2] See Public Serv. Co. of Colo. v. Andrus, 433 F.Supp. 144 (D. Colo. 1977). That case served as the basis for the trial court's holding in the instant case that 43 C.F.R. § 2802.1-2 was not authorized by any of those three Acts.

Alumet's application for right-of-way could be charged against Alumet. In thus deciding, the trial court held that under National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336 (1974) and Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974), assessable costs were limited to those costs which represented "value to the recipient," and that the preparation of the EIS in the instant case represented a benefit to the general public, and was of no benefit to Alumet.

National Cable and *New England Power* were both concerned with The Independent Offices Appropriation Act. A primary purpose behind that Act was to make federal agencies more self-supporting by increasing the fees theretofore charged persons for work performed by a federal agency to or for such person. In *National Cable* the Federal Communications Commission sought to impose a license fee which was, in part, tied to the number of subscribers of a particular cable television company. In other words, the annual fee included a charge at the rate of 30¢ for each individual subscriber. In *New England Power* the Federal Power Commission sought to impose a fee based, in part, on the amount of wholesale sales and interchange of electricity, which amounted to 0.14% of net income derived from such sales and interchange. In each case the Supreme Court set aside the fee sought to be imposed and while neither case dealt with the Congressional administration of public lands nor with language as express as that found in FLMPA, *National Cable* and *New England Power* each emphasized that, absent the delegated authority to tax, the "value to the recipient" standard shall be applied to limit the [Secretary] to the collection of "fees." Clearly, FLMPA is an express legislative mandate that all reasonable costs incurred by the Secretary in processing an application for rights-of-way on public lands shall be chargeable against the applicant for such rights-of-way, and further, that "reasonable costs" include, among other

things, the costs of environmental impact statements. We shall assume that Congress was aware of its limitations in delegating the authority to "tax." The language of § 1734 (b) reflects that understanding in that Congress expressed that the Secretary should consider the benefit to the general public in its attempted recoupment of costs of an EIS. To hold that, as a matter of law, an EIS inures solely to the benefit of the general public, and therefore, no part is assessable to the applicant is error.

An alternative reason given by the trial court for its action was based upon the statutory language of 43 U.S.C. § 1734. That statute first provides that the "reasonable costs" which may be charged against the applicant for a right-of-way over public lands include the cost of any environmental impact statement prepared and used in connection with the BLM's processing of such application. Stopping at that point in the statute, it would appear that Congress quite clearly intended that the cost of preparing such an environmental impact statement would be borne by the applicant for the right-of-way. Admittedly, the statute in question goes on in a succeeding sentence to provide that in determining what costs are "reasonable" costs the Secretary may take into consideration, among other things, "that portion of the costs incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant."

The trial court reasoned that the latter statutory provision which allowed the Secretary to exclude that portion of the costs incurred for the benefit of the general public *completely negated* the former provision in the same statute that reasonable costs included the cost of an environmental impact statement. We are not in accord with such reasoning. If such were a proper construction then the statement that reasonable costs include the cost of an environmental impact statement is meaningless. The latter statutory provision that the Secretary may consider that portion of the

costs incurred for the benefit of the general public interest may well *modify* the earlier provision that reasonable costs include cost of an environmental impact statement, but the latter provision does not, in effect, excise the former provision from the statute.

In sum, the trial court in granting summary judgment, ruled that the Secretary had no authority to seek reimbursement from Alumet for *any* part of the cost of preparing an environmental impact statement incident to Alumet's application for a right-of-way over public lands. In our view, such holding is erroneous.

Judgment reversed and case remanded for further proceedings consonant with the views herein expressed.

APPENDIX E

1. Title V of the Independent Offices Appropriation Act. 31 U.S.C. § 483a, provides:

It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

2. 10 C.F.R. Part 170 (1974) (see 38 Fed. Reg. 18443), provides:

§ 170.1 Purpose.

The regulations in this part set out fees charged for licensing services rendered by the Atomic Energy Commission, as authorized under Title V of the Independent Offices Appropriation Act of 1952 (65 Stat. 290; 31 U.S.C. 483a) and provisions regarding their payment.

§ 170.2 Scope.

Except for persons who apply for or hold the licenses exempted in § 170.11, the regulations in this part apply to each person who is an applicant for, or holder of, a specific license, for byproduct material issued pursuant to Parts 30 and 32-35 of this chapter, for source material issued pursuant to Part 40 of this chapter, for special nuclear material issued pursuant to Part 70 of this chapter, or for a production or utilization facility issued pursuant to Part 50 of this chapter.

§ 170.3 Definitions.

As used in this part:

(a) "Byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(b) "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(c) "Materials license" means a byproduct material license issued pursuant to Part 30 of this chapter, or a source

material license issued pursuant to Part 40 of this chapter, or a special nuclear material license issued pursuant to Part 70 of this chapter.

(d) "Nuclear reactor" means an apparatus, other than an atomic weapon, designed or used to sustain nuclear fission in a self-supporting chain reaction.

(e) "Other production or utilization facility" means a facility other than a nuclear reactor licensed by the Commission under the authority of section 103 or 104 of the Atomic Energy Act of 1954, as amended (the Act), and pursuant to the provisions of Part 50 of this chapter.

(f) "Power reactor" means a nuclear reactor designed to produce electrical or heat energy licensed by the Commission under the authority of section 103 or subsection 104b of the Act and pursuant to the provisions of § 50.21(b) or § 50.22 of this chapter.

(g) "Production facility" means:

(1) Any nuclear reactor designed or used primarily for the formation of plutonium or uranium-233; or

(2) Any facility designed or used for the separation of the isotopes of uranium or the isotopes of plutonium, except laboratory scale facilities designed or used for experimental or analytical purposes only; or

(3) Any facility designed or used for the processing of irradiated materials containing special nuclear material, except (i) laboratory scale facilities designed or used for experimental or analytical purposes, and (ii) facilities in which the only special nuclear materials contained in the irradiated material to be processed are uranium enriched in the isotope U^{235} and plutonium produced by the irradiation, if the material processed contains not more than 10^{-6} grams of plutonium per gram of U^{235} and has fission product activity not in excess of 0.25 millicurie of fission products per gram of U^{235}.

(h) "Research reactor" means a nuclear reactor licensed by the Commission under the authority of subsection 104c of the Act and pursuant to the provisions of § 50.21(c) of this chapter for operation at a thermal power level of 10 megawatts or less, and which is not a testing facility as defined by paragraph (m) of this section.

(i) "Sealed source" means any byproduct material that is encased in a capsule designed to prevent leakage or escape of the byproduct material.

(j) "Source material" means:

(1) Uranium or thorium, or any combination thereof, in any physical or chemical form; or

(2) Ores which contain by weight one-twentieth of one percent (0.05%) or more of (i) uranium, (ii) thorium, or (iii) any combination thereof. Source material does not include special nuclear material.

(k) "Special nuclear material" means:

(1) Plutonium, uranium-233, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 51 of the Act, determines to be special nuclear material but does not include source material; or

(2) any material artificially enriched by any of the foregoing, but does not include source material.

(l) "Manufacturing license: means a license pursuant to Appendix M of Part 50 of this chapter to manufacture a nuclear power reactor(s) to be operated at sites not identified in the license application.

(m) "Testing facility" means a nuclear reactor licensed by the Commission under the authority of subsection 104c of the Act and pursuant to the provisions of § 50.21(c) of this chapter for operation at:

(1) A thermal power level in excess of 10 megawatts; or

(2) A thermal power level in excess of 1 megawatt, if the reactor is to contain:

(i) A circulating loop through the core in which the applicant proposes to conduct fuel experiments; or

(ii) A liquid fuel loading; or

(iii) An experimental facility in the core in excess of 16 square inches in cross-section.

(n) "Utilization facility" means any nuclear reactor other than one designed or used primarily for the formation of plutonium or U^{235} and any other equipment or device determined by rule of the Commission to be a utilization facility within the purview of subsection 11cc of the Act.

(o) "Waste disposal license" means a license specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of commercial disposal by land or sea burial by the waste disposal licensee.

(p) "Human use" means the internal or external administration of byproduct, source, or special nuclear material, or the radiation therefrom, to human beings.

§ 170.4 Interpretations.

Except as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in this part by an officer or employee of the Commission other than a written interpretation by the General Counsel will be recognized to be binding upon the Commission.

§ 170.5 Communications.

All communications concerning the regulations in this part should be addressed to the Director of Regulation,

U.S. Atomic Energy Commission, Washington, D.C. 20545. Communications may be delivered in person at the Commission's offices at 1717 H Street N.W., Washington, D.C.; at 7920 Norfolk Avenue, Bethesda, Md.; or at Germantown, Md.

§ 170.11 Exemptions.

(a) No application filing fees, license fees, or annual fees shall be required for:

(1) A license authorizing the export only of a production or utilization facility.

(2) A license authorizing the export only or import only of byproduct material, source material or special nuclear material.

(3) A license authorizing the receipt, ownership, possession, use or production of byproduct material, source material, or special nuclear material incidental to the operation of a production or utilization facility licensed under Part 50 of this chapter, including a license under Part 70 of this chapter, authorizing possession and storage only of special nuclear material at the site of a nuclear reactor for use as fuel in operation of the nuclear reactor or at the site of a spent fuel processing plant for processing at the plant.

(4) A construction permit or license applied for by, or issued to, a nonprofit educational institution for a production facility or utilization facility, other than a power reactor, to be used for teaching, training, or medical purposes, or for byproduct material, source material, or special nuclear material to be used for teaching, training, or medical purposes, or in connection with a facility, other than a power reactor, used for teaching, training, or medical purposes.

(5) A construction permit or license applied for by, or issued to, a Government agency, except for a utilization

facility designed to produce electrical or heat energy pursuant to section 103 or 104b of the Atomic Energy Act of 1954, as amended.

(6) [Reserved]

(7) [Reserved]

(8) A license authorizing the use of source material as shielding only in devices and containers, provided, however, that all other licensed byproduct material, source material, or special nuclear material in the device or container will be subject to the fees prescribed in § 170.31.

(9) A license for possession and use of byproduct material, source material, or special nuclear material applied for by, or issued to, an agency of a State or any political subdivision thereof.

(b) (1) The Commission may, upon application by an interested person, or upon its own initiative, grant such exemptions from the requirements of this part as it determines are authorized by law and are otherwise in the public interest. (2) Applications for exemption under this paragraph may include activities such as, but not limited to, the use of licensed materials for educational or noncommercial public displays or scientific collections. (3) The Commission may consider waiver of fee for any licensee who possessed licensed material on February 5, 1971, if an application is filed on or before October 15, 1971, to dispose of the licensed material or items containing licensed material by February 5, 1972. Such an application shall describe the licensed material then on hand. If a waiver is granted pursuant to this subparagraph, the Commission will amend the license to prohibit the acquisition of additional radioactive material in the interim.

§ 170.12 Payment of fees.

(a) *Application fees.* Each application for which a fee is prescribed in this part shall be accompanied by a remittance

in the full amount of the fee. No application will be accepted for filing or processed prior to payment of the full amount specified. Applications for which no remittance is received may be returned to the applicant. All application fees will be charged irrespective of the Commission's disposition of the application or a withdrawal of the application.

(b) *Construction permit fees, manufacturing license fees and operating fees.* Fees for construction permits, manufacturing licenses and operating licenses are payable when the construction permit, manufacturing license or operating license is issued. No construction permit, manufacturing license or operating license will be issued by the Commission until the full amount of the fee prescribed in this part has been paid.

(c) *Annual fees.* All licenses outstanding on August 10, 1973, are subject to payment of the annual fee prescribed by this Part 170, as amended, on or before December 8, 1973, and annually on August 10 thereafter; *Provided, however,* That in the case of licenses which have been subject to license fees prior to August 10, 1973, the next annual fee will be payable 1 year from the due date of the last fee payment and annually thereafter. In the case of licenses issued on or after August 10, 1973, annual fees are payable 1 year following the date of issuance of the license and annually thereafter.

(d) *Method of payment.* Fee payments shall be by check, draft, or money order payable to the U.S. Atomic Energy Commission.

SCHEDULE OF FEES

§ 170.21 Schedule of fees for production and utilization facilities.

Applicants for construction permits, manufacturing licenses or operating licenses for production or utilization facilities shall pay the fees set forth below:

Schedule of Fees

Facility (thermal megawatt values refer to maximum capacity stated in the permit or license as limited by license conditions or technical specifications)[1]	Application fee for construction permit	Application fee for manufacturing license	Construction[3] permit fee	Manufacturing license fee	Operating[4] license fee	Annual fee after issuance of operating license
(1) Power Reactor[5]	$125,000	$125,000	$250,000—$170/Mw(t)[2]	$125,000—$85.00/Mw(t)[6]	$250,000—$185/Mw(t)[2]	$65/Mw(t) ($20,000 minimum)
(2) Testing facility	3,900		$10,500		$15,200	$13,000.
(3) Research reactor	600		2,300		3,500	8,500.
(4) Other production or utilization facility	$100,000		160,000		250,000	215,000.

[See footnotes at end of table.]

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(5) Possession but not operation of production or utilization facility	600.

[1] Amendments reducing capacity shall not entitle the applicant to a partial refund of any fee; applications for amendments increasing capacity to a higher fee category will not be accepted for filing unless accompanied by the prescribed fee, which shall be determined by multiplication of the change in power level, expressed in megawatts thermal, by $185.

[2] Thermal megawatts.

[3] When construction permits are issued for two or more power reactors of the same design at a single power station that were subject to concurrent licensing review, the construction permit fee for the first reactor will be $250,000+$170/Mw(t) and $50,000+$30/Mw(t) for each additional reactor. When construction permits are issued for two or more power reactors for which a manufacturing license has been issued, the construction permit fee shall be $125,000+$85/Mw(t) for the first reactor and $25,000+$15/Mw(t) for each additional reactor.

[See footnotes at end of table.]

[4] When operating licenses are issued for two or more power reactors of the same design at a single power station that were subject to concurrent licensing review, the operating license fee will be $250,000+$185/Mw(t) for the first reactor and $150,000+$120/Mw(t) for each additional reactor.

[5] For construction permits and operating licenses for power reactors with a capacity in excess of 3,800 Mw(t), the fee will be computed on a maximum power level of 3,800 Mw(t).

[6] When a manufacturing license is issued for more than one power reactor, the fee will be $125,000+$85/Mw(t) for the first reactor and $25,000+$15/Mw(t) for each additional reactor.

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Category of materials licenses [1]	Application fee [2]	Annual fee [3,4]
1. Special nuclear material: [5]		
A. Licenses for quantities of five (5) kilograms or more of contained uranium 235, uranium 233, and plutonium, except for licenses for plutonium processing and fuel fabrication plants as defined in § 70.4(r) of this chapter, licenses for storage only, and licenses authorizing possession and use of special nuclear material in sealed sources excluding fuel elements.	$10,000+$10 per kilogram (maximum fee $85,000)	$10,000+$10 per kilogram (maximum fee $85,000)
B. Licenses for possession and use of special nuclear material in plutonium processing and fuel fabrication plants as defined in § 70.4(r) of this chapter.	$135,250	$135,250
C. Licenses for quantities of five (5) kilograms or more of contained uranium 235, uranium 233, and plutonium for storage only except for licenses authorizing storage only of special nuclear material in sealed sources excluding fuel elements.	$2,440	$2,440

[See footnotes at end of table.]

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D. Licenses for quantities of 350 grams to five (5) kilograms of contained uranium 235, uranium 233, and plutonium except for licenses for storage only, licenses covered by Categories 4A, 4B, 5A, or 6A, and licenses authorizing possession and use of special nuclear material in sealed sources excluding fuel elements.	$3.50/gram (maximum fee $6,000)	$3.50/gram (maximum fee $6,000)
E. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems.	$50	$50
F. All other specific special nuclear material licenses, except those licenses covered by Categories 4A, 4B, 5A, 6A, 7A, 7B, 7C, or 8A.	$200	$200
2. Source material:		
A. Licenses for source material for use in milling operations and licenses for refining mill concentrates to uranium hexafluoride.	$10,050	$10,050
B. Licenses for source material in quantities greater than 50 kilograms except licenses for storage only and licenses for use only of source material in counterweights.	$150	$150

[See footnotes at end of table.]

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Category of materials licenses [1]	Application fee [2]	Annual fee [3,4]
C. All other specific source material licenses, except those licenses covered by Categories 4A, 4B, 6A, 7A, 7B, 7C, or 8A.	$80	$80
3. Byproduct material:		
A. Licenses for possession and use of byproduct material issued pursuant to Parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution that require product safety evaluation.	$2,000	$2,000
B. Licenses for possession and use of byproduct material issued pursuant to Parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material where no product safety evaluation is required or quantities of byproduct material for commercial distribution except exempt quantities as defined in § 30.18 of Part 30 of this chapter.	$1,000	$1,000

[See footnotes at end of table.]

C. Licenses for byproduct material issued pursuant to Part 34 of this chapter for industrial radiography operations at one location.	$275	$275
D. Licenses for byproduct material issued pursuant to Part 34 of this chapter for industrial radiography operations at more than one location.	$550	$550
E. Licenses for possession and use of byproduct material in quantities of less than 10,000 curies in sealed sources for irradiation of materials.	$90	$90
F. Licenses for possession and use of byproduct material in quantities of 10,000 curies or more in sealed sources for irradiation of materials.	$180	$180
G. Licenses issued pursuant to Subpart B of Part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material to persons generally licensed under Parts 31 or 35 of this chapter, except specific licenses authorizing redistribution of items which have been manufactured or imported under a specific license and licensed by the Commission for distribution to persons generally licensed under Parts 31 or 35 of this chapter.	$335	$335

[See footnotes at end of table.]

Category of materials licenses [1]	Application fee [2]	Annual fee [3,4]
H. Licenses issued pursuant to Subpart A of Part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material to persons exempt from the licensing requirements of Part 30 of this chapter, except (1) §§ 32.11 and 32.18 of this chapter, (2) specific licenses authorizing redistribution of items and quantities which have been manufactured or imported under a specific license and licensed by the Commission for distribution to persons exempt from the licensing requirements of Part 30 of this chapter, and (3) specific licenses which authorize distribution of timepieces, hands and dials.	$510	$510
I. Licenses issued pursuant to § 32.18 of this chapter to distribute quantities of byproduct material to persons exempt from the licensing requirements of Part 30 of this chapter.	$165	$165

[See footnotes at end of table.]

J. Licenses issued pursuant to § 32.14 of this chapter to distribute timepieces, hands and dials, containing hydrogen 3 or promethium 147 to persons exempt from the licensing requirements of Part 30 of this chapter.	$50	$50
K. Licenses for possession and use of byproduct material for research and development, except those licenses covered by Categories 3A or 3B, and licenses covered by Categories 7B or 7C authorizing medical research.	$255	$255
L. All other specific byproduct material licenses, except those in Categories 4A, 4B, 5A, 6A, 7A, 7B, 7C, and 8A.	$50	$50
4. Waste disposal:		
A. Waste disposal licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of commercial disposal by land or sea burial by the waste disposal licensee.	$3,000	$3,000

[See footnotes at end of table.]

Category of materials licenses [1]	Application fee [2]	Annual fee [3,4]
B. Waste disposal licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of commercial disposal by the waste disposal licensee by transfer to another person authorized to receive such material.	$415	$415
5. Well logging and well surveys and tracer studies:		
A. Licenses for possession and use of special nuclear material and byproduct material for well logging, well surveys, and tracer studies.	$270	$270
6. Nuclear laundries:		
A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, and special nuclear material.	$335	$335
7. Human use:		
A. Licenses issued pursuant to Parts 30, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices.	$150	$150

[See footnotes at end of table.]

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Category of materials licenses [1]	Application fee [2]	Annual fee [3,4]
B. Licenses issued pursuant to Parts 30, 40, and 70 of this chapter to medical institutions for human use of byproduct material, source material or special nuclear material, except licenses in Category 7A.	$180	$180
C. Licenses issued pursuant to Parts 30, 40, and 70 of this chapter to physicians for human use of byproduct material, source material, or special nuclear material, except licenses in Category 7A.	$110	$110
8. Civil defense:		
A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities.	$35	$35

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[1] Amendments based on applications filed after the due date of the annual license fee, reducing the scope of a licensee's program or cancelling a license, may entitle the licensee to a partial refund of an annual fee that has been paid by the licensee for the year in which such amendment or cancellation occurs; in such cases, the refund shall be computed on a pro rata basis beginning with the date the fee is due and the date the license is amended or cancelled; *Provided however,* That no refund will be made for $35 or less, and no partial payment of less than $35 will be accepted. The licensee must apply for the refund or reduced payment. Applications for amendments increasing the scope of a program to a

[Footnote continued on next page]

higher fee category will not be accepted for filing unless accompanied by the prescribed fee less the amount of the currently prescribed fee for the activities already licensed.

[2] Applications for materials licenses covering more than one fee category shall be accompanied by the prescribed fee for each category.

[3] Payment of the prescribed annual fee does not automatically renew the license for which the fee is paid. Renewal applications must be filed in accordance with the requirements of Parts 30, 40 or 70 of this chapter of the Commission's regulations. Applications for reissuance of licenses that have expired because a timely renewal application was not filed must be accompanied by the prescribed application fee.

[4] The annual fee will be waived where an application is filed to cancel the license prior to the due date of the annual fee, and the amount of the annual fee will be reduced where an application is filed to amend the license to reduce its scope prior to the due date of the annual fee; *Provided however,* That no annual fee will be waived or reduced unless the application filed prior to the due date of the fee contains all the information necessary to permit the Commission to complete the requested action.

[5] Licensees required to pay fees under Categories 1A through 1D are not required to pay a fee under Category 1E for sealed sources.

ENFORCEMENT

§ 170.41 Failure by licensee to pay annual fees.

In any case where the Commission finds that a licensee has failed to pay the applicable annual fee required in this part, the Commission may suspend or revoke the license or may issue such order with respect to licensed acivities as the Commission determines to be appropriate or necessary in order to carry out the provisions of this part, Parts 30, 40, 50, and 70 of this chapter and of the Act.

3. 10 C.F.R. Part 170 (1979) (see 43 Fed. Reg. 7210), provides:

§ 170.1 Purpose.

The regulations in this part set out fees charged for licensing services rendered by the Nuclear Regulatory Commission as authorized under Title V of the Independent Offices Appropriation Act of 1952 (65 Stat. 290; 31 U.S.C. 483a) and provisions regarding their payment.

§ 170.2 Scope.

Except for persons who apply for or hold the permits, licenses, or approvals exempted in § 170.11, the regulations in this part apply to a person who is an applicant for, or holder of, a specific byproduct material license issued pursuant to Parts 30 and 32-35 of this chapter, a specific source material license issued pursuant to Part 40 of this chapter, a specific special nuclear material license issued pursuant to Part 70 of this chapter, a specific approval of spent fuel casks and shipping containers issued pursuant to Part 1 of this chapter, a specific request for approval of sealed sources and devices containing byproduct material, source material, or special nuclear material, or a production or utilization facility construction permit and operating license issued pursuant to Part 50 of this chapter, to routine safety and safeguards inspections of a licensed person, to a person who applies for approval of a reference standardized design

of a nuclear steam supply system or balance of plant, for review of a facility site prior to the submission of an application for a construction permit, for review of a standardized spent fuel facility design, and for a special project review which the Commission completes or makes whether or not in conjunction with a license application on file or which may be filed.

§ 170.3 Definition.

As used in this part:

(a) "Byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

(b) "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(c) "Materials license" means a byproduct material license issued pursuant to Part 30 of this chapter, or a source material license issued pursuant to Part 40 of this chapter, or a special nuclear material license issued pursuant to Part 70 of this chapter.

(d) "Nuclear reactor" means an apparatus, other than an atomic weapon, designed or used to sustain nuclear fission in a self-supporting chain reaction.

(e) "Other production or utilization facility" means a facility other than a nuclear reactor licensed by the Commission under the authority of section 103 or 104 of the Atomic Energy Act of 1954, as amended (the Act), and pursuant to the provisions of Part 50 of this chapter.

(f) "Power reactor" means a nuclear reactor designed to produce electrical or heat energy licensed by the Commission under the authority of section 103 or subsection 104b of the Act and pursuant to the provisions of § 50.21(b) or § 50.22 of this chapter.

(g) "Production facility" means:

(1) Any nuclear reactor designed or used primarily for the formation of plutonium or uranium-233; or

(2) Any facility designed or used for the separation of the isotopes of uranium or the isotopes of plutonium, except laboratory scale facilities designed or used for experimental or analytical purposes only; or

(3) Any facility designed or used for the processing of irradiated materials containing special nuclear material except:

(i) Laboratory scale facilities designed or used for experimental or analytical purposes;

(ii) Facilities in which the only special nuclear materials contained in the irradiated material to be processed are uranium enriched in the isotope U^{235} and plutonium produced by the irradiation, if the material processed contains not more than 10^{-6} grams of plutonium per gram of U^{235} and has fission product activity not in excess of 0.25 millicurie of fission products per gram of U^{235}; and

(iii) Facilities in which processing is conducted pursuant a license issued under Parts 30 and 70 of this chapter, or equivalent regulations of an Agreement State, for the receipt, possession, use, and transfer of irradiated special nuclear material, which authorizes the processing of the irradiated material on a batch basis for the separation of selected fission products and limits the process batch to not more than 100 grams of uranium enriched in the isotope 235 and not more than 15 grams of any other special nuclear material.

(h) "Research reactor" means a nuclear reactor licensed by the Commission under the authority of subsection 104c of the Act and pursuant to the provisions of § 50.21(c) of this chapter for operation at a thermal power level of 10 megawatts or less, and which is not a testing facility as defined by paragraph (m) of this section.

(i) "Sealed source" means any byproduct material that is encased in a capsule designed to prevent leakage or escape of the byproduct material.

(j) "Source material" means:

(1) Uranium or thorium, or any combination thereof, in any physical or chemical form; or

(2) Ores which contain by weight one-twentieth of one percent (0.05%) or more of (i) uranium, (ii) thorium, or (iii) any combination thereof. Source material does not include special nuclear material.

(k) "Special nuclear material" means:

(1) Plutonium, uranium-233, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 51 of the Act, determines to be special nuclear material but does not include source material; or

(2) any material artificially enriched by any of the foregoing, but does not include source material.

(l) "Manufacturing license" means a license pursuant to Appendix M of Part 50 of this chapter to manufacture a nuclear power reactor(s) to be operated at sites not identified in the license application.

(m) "Testing facility" means a nuclear reactor licensed by the Commission under the authority of subsection 104c of the Act and pursuant to the provisions of § 50.21(c) of this chapter for operation at:

(1) A thermal power level in excess of 10 megawatts; or

(2) A thermal power level in excess of 1 megawatt, if the reactor is to contain:

(i) A circulating loop through the core in which the applicant proposes to conduct fuel experiments; or

(ii) A liquid fuel loading; or

(iii) An experimental facility in the core in excess of 16 square inches in cross-section.

(n) "Utilization facility" means any nuclear reactor other than one designed or used primarily for the formation of plutonium or U^{235} and any other equipment or device determined by rule of the Commission to be a utilization facility within the purview of subsection 11cc of the Act.

(o) [Reserved]

(p) "Human use" means the internal or external administration of byproduct, source, or special nuclear material, or the radiation therefrom, to human beings.

(q) "Nuclear Steam Supply System" consists of the reactor core, reactor coolant system, and related auxiliary systems including the emergency core cooling system; decay heat removal system; and chemical volume and control system.

(r) "Balance of plant" consists of the remaining systems, components, and structures that comprise a complete nuclear power plant and are not included in the nuclear steam supply system.

(s) "Special projects" means those projects submitted to the Commission for review and for which specific fees are not prescribed in this chapter. Examples of special projects include, but are not limited to, topical reports, early site reviews, waste solidification facilities, fuel reprocessing facilities, and amendment or renewal of standardized reference design approvals.

(t) "Routine inspection" performed at frequencies or during a certain period of time prescribed by the Commission for purposes of reviewing a licensee's authorized activities to assure that they are being conducted in accordance with regulatory or statutory requirements and that associated facilities and equipment are being operated in a safe manner.

(u) "Duplicate unit" means one of a limited number of the same kind of units which are to be constructed within a limited time span and subject to review at the same time by the staff.

(v) "Replicate unit" means a unit based on the reuse of a plant design, previously reviewed and approved for construction by the same utility or by another utility as part of another construction permit application.

(w) "Reference systems concept" means a concept that involves the review of an entire facility design or major fraction of a facility design outside of the context of a license application. The standard design would be referenced in subsequent license applications.

(x) "Advanced reactor" means any nuclear reactor concept other than light water reactors and high temperature gas cooled reactors.

§ 170.4 Interpretations.

Except as specifically authorized by the Commission in writing, no interpretation of the meaning of the regulations in this part by an officer or employee of the Commission other than a written interpretation by the General Counsel will be recognized to be binding upon the Commission.

§ 170.5 Communications.

All communications concerning the regulations in this part should be addressed to the Executive Director for Operation, U.S. Nuclear Regulatory Commission, Washington,

D.C. 20555. Communications may be delivered in person at the Commission's offices at 1717 H Street N.W., Washington, D.C. or at 7920 Norfolk Avenue, Bethesda, Md.

§ 170.11 Exemptions.

(a) No application fees, license fees, amendment fees, renewed fees, approval fees, or inspection fees shall be required for:

(1) A license authorizing the export only of a production or utilization facility.

(2) A license authorizing the export only or import only of byproduct material, source material or special nuclear material.

(3) A license authorizing the receipt, ownership, possession, use or production of byproduct material, source material, or special nuclear material incidental to the operation of a production or utilization facility licensed under Part 50 of this chapter, including a license under Part 70 of this chapter, authorizing possession and storage only of special nuclear material at the site of a nuclear reactor for use as fuel in operation of the nuclear reactor or at the site of a spent fuel processing plant for processing at the plant.

(4) A construction permit or license applied for by, or issued to, a nonprofit educational institution for a production facility or utilization facility, other than a power reactor, to be used for teaching, training, or medical purposes, or for byproduct material, source material, or special nuclear material to be used for teaching, training, or medical purposes, or in connection with a facility, other than a power reactor, used for teaching, training, or medical purposes.

(5) A construction permit or license applied for by, or issued to, a Government agency, except for a utilization

facility designed to produce electrical or heat energy pursuant to section 103 or 104b of the Atomic Energy Act of 1954, as amended.

(6) [Reserved]

(7) [Reserved]

(8) A license authorizing the use or source material as shielding only in devices and containers, provided, however, that all other licensed byproduct material, source material, or special nuclear material in the device or container will be subject to the fees prescribed in § 170.31.

(9) A license for possession and use of byproduct material, source material, or special nuclear material applied for by, or issued to, an agency of a State or any political subdivision thereof, except for licenses which authorize distribution of byproduct material, source material, or special nuclear material, or products containing byproduct material, source material, or special nuclear material, or licenses authorizing services to any person other than an agency or political subdivision of the State.

(b) (1) The Commission may, upon application of an interested person, or upon its own initiative, grant such exemptions from the requirements of this part as it determines are authorized by law and are otherwise in the public interest.

(2) Applications for exemption under this paragraph may include activities such as, but not limited to, the use of licensed materials for educational or noncommercial public displays or scientific collections.

§ 170.12 Payment of fees.

(a) *Application Fees.* Each application for which a fee is prescribed shall be accompanied by a remittance in the full amount of the fee. No application will be accepted for filing or processed prior to payment of the full amount

specified. Applications for which no remittance is received may be returned to the applicant. All application fees will be charged irrespective of the Commission's disposition of the application or a withdrawal of the application.

(b) *License Fees.* Fees for construction permits, operating licenses, manufacturing licenses, and materials licenses, are payable upon notification by the Commission when the review of the project is completed.

(c) *Amendment Fees.* The appropriate amendment fee shall accompany the application for amendment when filed with the Commission. Where applicable, the applicant shall provide a proposed determination of the amendment class and state the basis therefor as part of the amendment request and shall remit the fee corresponding to this determination with the application for amendment. The Commission will examine the amendment fee and will, where applicable, refund any overcharges or bill the applicant for the additional amendment fee.

(d) *Renewal Fees.* The appropriate renewal fee shall accompany the renewal application when filed with the Commission.

(e) *Approval Fees.* Fees for spent fuel cask and shipping container approvals, standardized spent fuel facility design approvals, and construction approvals are payable upon notification by the Commission when the review of the project is completed. Fees for facility reference standardized design approvals will be paid in five (5) installments based on payment of 20 percent of the approval fee (see footnote 3 § 170.21) as each of the first five (5) units of the approved design are referenced in an application(s) filed by a utility or utilities.

(f) *Special Project Fees.* Fees for special projects are payable upon notification by the Commission when the review of the project is completed.

(g) *Inspection Fees.* Inspection fees are payable upon notification by the Commission.

(h) *Method of Payment.* Fee payments shall be by check, draft, or money order made payable to the U.S. Nuclear Regulatory Commission.

§ 170.21 Schedule of fees for production and utilization facilities, review of reference standardized designs, and special projects.

(a) Applicants for construction permits, manufacturing licenses, operating licenses, and approvals of reference standardized facilities designs, shall pay the fees set forth in the table below.

(b) Applicants for special project reviews shall pay fees as sparately determined by the Commission.

SCHEDULE OF FACILITY FEES

Facility categories	Types of fees	Fee [1]
A. Power reactors:		
1. Custom [3]	Application—Construction permit	$ 125,000
	Construction permit—First unit	944,000
	Construction permit—Concurrent unit [2]	174,000
	Operating license—First unit	1,024,500
	Operating license—Concurrent unit [2]	302,800
2. Standardized design—duplicate unit [3].	Application—Construction permit	125,000
	Construction permit—First unit	944,000
	Construction permit—Concurrent unit [2]	174,000
	Construction permit—First identical unit additional site(s)	757,100
	Operating license—First unit	1,024,500
	Operating license—Concurrent unit [2]	300,200
	Operating license—First identical unit additional site(s) ..	712,000
3. Standardized design—replicate unit [3].	Application—Construction permit	125,000
	Construction permit—First unit	811,600
	Construction permit—Concurrent unit [2]	164,200
	Construction permit—First identical unit additional site(s)	725,900
	Operating license—First unit	914,400
	Operating license—Concurrent unit [2]	293,900
	Operating license—First identical unit additional site(s) ..	691,500

[See footnotes at end of table.]

Facility categories	Types of fees	Fee [1]
4. Standardized design—Reference systems concept: [3]		
a. Utility referencing a standardized nuclear steam supply system and custom balance of plant for both CP and OL stages.	Application—Construction permit	125,000
	Construction permit—First unit	853,600
	Construction permit—Concurrent unit [2]	162,500
	Construction permit—First identical unit additional site(s)	725,900
	Operating license—First unit	934,100
	Operating license—Concurrent unit [2]	292,100
	Operating license—First identical unit additional site(s)	669,200
b. Utility referencing a standardized nuclear steam supply system and standardized balance of plant for both the CP and OL stages.	Application—Construction permit	125,000
	Construction permit—First unit	721,800
	Construction permit—Concurrent unit [2]	162,500
	Construction permit—First identical unit additional site(s)	725,900
	Operating license—First unit	829,100
	Operating license—Concurrent unit [2]	292,100
	Operating license—First identical unit additional site(s)	669,200

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[See footnotes at end of table.]

5. Manufacturing license concept: [3]		
a. Vendor—review of preliminary design.	Application	125,000
	Manufacturing license	1,477,500
b. Vendor—review of final design.	Final design amendment	448,100
c. Utility referencing a manufacturing license.	Application—Construction permit	125,000
	Construction permit—First unit	730,000
	Construction permit—Concurrent unit [2]	61,500
	Operating license—First unit	1,001,200
	Operating license—Concurrent unit [2]	221,000
6. Advanced reactors [3]	Application—Construction permit	125,000
	Construction permit	1,781,000
	Operating license	1,954,900

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[See footnotes at end of table.]

Facility categories	Types of fees	Fee [1]
B. Standard reference design review: [3]		
1. Vendor—Standardized nuclear steam supply system:		
a. Review of preliminary reference design.	Application	50,000
	Approval	412,100
b. Review of final reference design.	Application	50,000
	Approval	483,400
2. Architect-engineer—Standardized balance of plant:		
a. Review of preliminary reference design.	Application	50,000
	Approval	412,100
b. Review of final reference design.	Application	50,000
	Approval	501,200
C. Test facility: [3]	Application—Construction permit	5,000
	Construction permit	67,200
	Operating license	100,300
D. Research reactor: [3]	Application—Construction permit	5,000
	Construction permit	34,900
	Operating license	55,000
E. Uranium enrichment plants: [3]	Application—Construction permit	125,000
	Construction permit	388,400
	Operating license	457,200
F. Special projects and reviews [4]		

[1] Where a partial fee for a power reactor operating license has been paid prior to the effective date of this amendment, the amount paid shall be deducted from the fee prescribed by this amendment and the difference will be due when the operating license for 100 pct power is issued.

[2] *Concurrent unit.* A concurrent unit is defined as a power reactor of the same design at a single power station that was subject to concurrent licensing review.

[3] When review of the permit, license, approval, or amendment is complete, the expenditures for professional manpower and appropriate support services will be determined and the resultant fee assessed, but in no event will the fee exceed that shown in the schedule of facility fees. When one applica-

[Footnote continued on next page]

tion for a preliminary design approval or final design approval contains more than one design, the additional approvals are subject to a maximum fee which is the sum of the application fee and approval fee.

[4] Charge will be separately determined by the Commission taking into account the professional manpower required to conduct the review multiplied by the applicable cost per man-year plus any appropriate support services costs incurred. Where a fee has been paid for a facility early site review, the charge will be deducted from the fee for a construction permit issued for that site. A separate charge will not be assessed for a site review where the person requesting the review has an application for a construction permit on file for the same site, except where the application is withdrawn by the applicant or denied by the Commission. The maximum fee for review of a topical report shall not exceed $20,000.

§ 170.22 Schedule of fees for facility license amendments.

SCHEDULE OF AMENDMENT FEES FOR REACTOR FACILITY PERMITS, LICENSES, AND OTHER APPROVALS REQUIRED BY THE LICENSE OR COMMISSION REGULATION

Class of Amendment [1]	Fee [2]	
	Power reactors	Test and research reactors
CLASS I: Amendments that are a duplicate of an amendment for a second essentially identical unit at the same site, where both proposed amendments are received, processed, and issued at the same time	$400	
CLASS II: Amendments that are pro forma, administrative in nature, or have no safety or environmental significance	1,200	$600
CLASS III: Amendments, exemptions, or required approvals that involve a single environmental, safety, or other issue, have acceptability for the issue clearly identified by an NRC position, or are deemed not to involve a significant hazards consideration	4,000	2,000

[See footnotes at end of table.]

Class of Amendment [1]	Fee [2]	
	Power reactors	Test and research reactors
CLASS IV: Amendments, exemptions, or required approvals that involve a complex issue or more than one environmental, safety, or other issue, or several changes of the class III type incorporated into the proposed amendment, or involve a significant hazards consideration, or require an extensive environmental impact appraisal, or result from dismantling or license termination orders	12,300	6,000
CLASS V: Amendments, exemptions, or required approvals that require evaluation of several complex issues, or involve review by the ACRS, or require an environmental impact statement	25,800	12,000
CLASS VI: Amendments, exemptions, or required approvals that require evaluation of a new Safety Analysis Report and rewrite of the facility license (including technical specifications), such as may be required for a license renewal	45,900	20,000

[1] At the time the application is filed, the licensee or applicant shall provide a proposed determination of amendment class and state the basis therefor as part of the amendment or modification request and shall remit the fee corresponding to this determination. The Commission will evaluate the proposed amendment class determination and inform the licensee or applicant if reclassification is required. Reclassification that changes the class of amendment will result in the refund of over-charges to the licensee or applicant or billing the license or applicant for additional fees.

[2] License amendments or approvals resulting from Commission Orders issued pursuant to 10 CFR 2.204) and amendments resulting in an initial increase in power to 100 percent of the initial design power level are not subject to these fees, except as provided in footnote 1 to § 170.21. Class I, II, or III amendments which result from a written Commission request for the application may be exempt from fees when the amendment is to simplify or clarify license or technical specifications; the amendment has only minor safety significance, and is issued for the convenience of the Commission.

§ 170.23 Schedule of fees for routine health, safety and environmental inspections of facilities.

SCHEDULE OF FACILITY ROUTINE HEALTH, SAFETY AND ENVIRONMENTAL INSPECTION FEES [1]

Category	Fee [1]	Maximum frequency [2]
(1) Power reactor:		
First unit	$75,700 per year	Continuous.
Additional units at same site [3]	$60,400 per year	Do.
(2) Test reactor	$4,500 per inspection	2 per year.
(3) Research reactor	$4,200 per inspection	1 every 2 years.
(4) Other production or utilization facility [4]	$42,100 per year	Continuous.
(5) Production or utilization facility licensed for possession but not operation	$650 per year	1 per year.

[1] Routine inspections are safety, environmental, and health physics inspections performed at specified frequencies for purposes of reviewing a licensed program to assure that the authorized activities are being conducted in accordance with the Atomic Energy Act of 1954, as amended, Commission regulations, and the terms and conditions of the license.

[2] The frequency shown in the schedule is the maximum number of routine inspections for which a fee will be assessed.

[3] A reduced fee will be charged when the inspection of an additional unit at the same site is conducted concurrently with the first unit.

[4] Fee is applicable for a fuel reprocessing facility and for a uranium enrichment facility.

§ 170.24 Schedule of fees for routine safeguards inspections of facilities.

SCHEDULE OF FACILITY ROUTINE SAFEGUARDS INSPECTION FEES

Category	Fee	Maximum frequency [1]
(1) Power reactor:		
First unit	$11,800 per year	2 per year.
Additional unit at same site [2]	$9,500 per year	Do.
(2) Test reactor (fuel of high strategic importance)	$6,500 per inspection	1 per year.
(3) Research reactor (fuel of moderate strategic importance)	$1,300 per inspection	1 every 2 years.
(4) Other production or utilization facility [3]	$38,700 per year	3 per year.

[1] The frequency shown in the schedule is the maximum number of safeguards inspections for which a fee will be assessed. Power reactors and other production and utilization facilities will be assessed the yearly inspection fee shown in the above table.

[2] A reduced fee will be charged with the inspection of additional unit(s) at the same site is conducted concurrently with the first unit.

[3] Fee is applicable for a fuel reprocessing facility and for a uranium enrichment facility.

§ 170.31 Schedule of fees for materials licenses and other regulatory services.

Applicants for materials licenses and other regulatory services and holders of materials licenses shall pay the following fees.

Category of materials licenses	Type of fee [1]	Fee
1. Special nuclear material: [2]		
A. Licenses for possession and use of 5 kg or more of contained uranium 235 in uranium enriched to 20 pct or more, or 2 kg or more of uranium 233, for fuel processing and fabrication.[4]	Application	$14,000
	New license	122,600
	Renewal	76,800
	Amendment: [3]	
	Major—Safety and environmental	34,600
	Major—Safeguards	8,300
	Minor—Safety and environmental	1,400
	Minor—Safeguards	3,500
	Administrative	150
B. Licenses for possession and use of 5 kg or more of contained uranium 235 in uranium enriched to less than 20 pct. for fuel processing and fabrication.[4]	Application	12,000
	New license	112,800
	Renewal	71,900
	Amendment: [3]	
	Major—Safety and environmental	34,600
	Major—Safeguards	6,900
	Minor—Safety and environmental	1,400
	Minor—Safeguards	3,500
	Administrative	150

[See footnotes at end of table.]

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C. Licenses for possession and use of 2 kg or more of plutonium for fuel processing and fabrication.[4]	Application for construction approval	50,000
	Construction approval	480,300
	License fee	241,600
	Renewal	170,800
	Amendment: [3]	
	Major—Safety and environmental	75,000
	Major—Safeguards	13,800
	Minor—Safety and environmental	1,400
	Minor—Safeguards	6,200
	Administrative	150
D. Licenses for possession and use of 5 kg or more of contained uranium 235 in unsealed form, or 2 kg or more of uranium 233 in unsealed form for activities other than fuel processing and fabrication.[4]	Application	3,000
	New license	31,600
	Renewal	18,000
	Amendment:	
	Safety and environmental	1,400
	Safeguards	2,800
	Administrative	150

[See footnotes at end of table.]

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Category of materials licenses	Type of fee [1]	Fee
E. Licenses for possession and use of quantities of plutonium of 2 kg or more in unsealed form for activities other than fuel processing and fabrication.[4]	Application	6,000
	New license	56,300
	Renewal	38,100
	Amendment:	
	Safety and environmental	1,400
	Safeguards	6,900
	Administrative	150
F. Licenses for possession and use of 200 g but less than 2 kg of plutonium in unsealed form.[4]	Application	5,000
	New license	42,100
	Renewal	29,800
	Amendment:	
	Safety and environmental	1,400
	Safeguards	4,800
	Administrative	150
G. Licenses for possession and use of 350 g but less than 5 kg of contained uranium 235 in unsealed form, or 200 g but less than 2 kg of uranium 233 in unsealed form.[4]	Application	2,000
	New license	18,800
	Renewal	11,100
	Amendment:	
	Safety and environmental	1,400
	Safeguards	2,800
	Administrative	150

[See footnotes at end of table.]

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H. Licenses for receipt and storage of spent fuel:[4] (1) License application for a storage facility of custom design requiring a full design review:		
(a) Storage facility to be located at a new site.	Application	35,000
	New license	290,000
	Renewal	32,000
	Amendment:[3]	
	Major—Safety and environmental	88,500
	Major—Safeguards	6,200
	Minor—Safety and environmental	3,500
	Minor—Safeguards	3,500
	Administrative	150
(b) Storage facility to be located at the site of an existing nuclear facility.[5]	Application	25,000
	New license	209,300
	Renewal	32,000
	Amendment:[3]	
	Major—Safety and environmental	88,500
	Major—Safeguards	6,200
	Minor—Safety and environmental	3,500
	Minor—Safeguards	3,500
	Administrative	150

[See footnotes at end of table.]

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Category of materials licenses	Type of fee [1]	Fee
(2) License application for a storage facility which references an approved standardized design:		
(a) Storage facility to be located at a new site.	Application	25,000
	New license	236,600
	Renewal	32,000
	Amendment: [3]	
	Major—Safety and environmental	88,500
	Major—Safeguards	6,200
	Minor—Safety and environmental	3,500
	Minor—Safeguards	3,500
	Administrative	150
(b) Storage facility to be located at the site of an existing nuclear facility.[5]	Application	15,000
	New license	130,000
	Renewal	32,000
	Amendment: [3]	
	Major—Safety and environmental	88,500
	Major—Safeguards	6,200
	Minor—Safety and environmental	3,500
	Minor—Safeguards	3,500
	Administrative	150

[See footnotes at end of table.]

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(3) License application for a storage facility of duplicate design—design which is identical to a previously licensed detail design:		
(a) Storage facility to be located at a new site.	Application	15,000
	New license	159,200
	Renewal	32,000
	Amendment: [3]	
	Major—Safety and environmental	88,500
	Major—Safeguards	6,200
	Minor—Safety and environmental	3,500
	Minor—Safeguards	3,500
	Administrative	150
(b) Storage facility to be located at the site of an existing nuclear facility.[5]	Application	10,000
	New License	73,500
	Renewal	32,000
	Amendment: [3]	
	Major—Safety and environmental	88,500
	Major—Safeguards	6,200
	Minor—Safety and environmental	3,500
	Minor—Safeguards	3,500
	Administrative	150

[See footnotes at end of table.]

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Category of materials licenses	Type of fee [1]	Fee
I. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems.[2]	Application—New license	110
	Renewal	110
	Amendment	40
J. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity as defined in § 150.11 of Part 150 which shall pay the same rate as Category 1G and special nuclear material for use in power generation which shall pay the fee in Category 10.[2]	Application—New license	460
	Renewal	460
	Amendment	110
2. Source material:		
A. Licenses for possession and use of source material in milling operations, except in in situ leaching and heap-leaching operations.	Application	11,000
	New license [4]	96,700
	Renewal [4]	100,800
	Amendment: [3]	
	Major—Safety and environmental [4]	20,800
	Minor—Safety and environmental [4]	3,500
	Administrative	150
B. Licenses for processing and recovery of source material in in situ leaching operations or heap-leaching operations.	Production scale activity:	
	Application	7,000
	New license [4]	59,500
	Research and development scale activity:	
	Application	2,000
	New license [4]	21,800
	Renewal [4]	[6]17,300
	Amendment: [3]	
	Major—Safety and environmental [4]	[6]4,200
	Minor—Safety and environmental	[6]760
	Administrative	[6]150
C. Licenses for refining uranium mill concentrates to uranium hexafluoride.	Application	11,000
	New license [4]	96,700
	Renewal [4]	45,800
	Amendment: [3]	
	Major—Safety and environmental [4]	20,800
	Minor—Safety and environmental [4]	3,500
	Administrative	150
D. All other source material licenses	Application—New license	140
	Renewal	70
	Amendment	40

[See footnotes at end of table.]

Category of materials licenses	Type of fee [1]	Fee
3. Byproduct material:		
A. Licenses for possession and use of byproduct material issued pursuant to Parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution, except byproduct material for use in power generation which shall pay the fee in category 10.	Application—New license	460
	Renewal	460
	Amendment	110
B. Licenses issued pursuant to § 32.72 of this chapter authorizing the processing or manufacture and distribution of radiopharmaceuticals containing byproduct material.	Application—New license	190
	Renewal	150
	Amendment	40
C. Licenses for byproduct material issued pursuant to Part 34 of this chapter for industrial radiography operations performed in shielded radiography installation(s) or permanently designated area(s) at the address(es) listed in the license.	Application—New license	190
	Renewal	150
	Amendment	40
D. Licenses for byproduct material issued pursuant to Part 34 of this chapter for industrial radiography operations performed in a shielded radiography installation(s) and at multiple temporary locations at the address(es) shown in the licenses or at temporary jobsites of the licensee in the field.	Application—New license	460
	Renewal	460
	Amendment	110
E. Licenses for possession and use of byproduct material in sealed sources of irradiation of materials where the source is not removed from its shield (self-shielded units).	Application—New license	190
	Renewal	150
	Amendment	40
F. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials where the source is exposed for irradiation purposes.	Application—New license	460
	Renewal	460
	Amendment	110

[See footnotes at end of table.]

Category of materials licenses	Type of fee [1]	Fee
G. Licenses issued pursuant to Subpart B of Part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material to persons generally licensed under Parts 31 or 35 of this chapter, except specific licenses authorizing redistribution of items which have been manufactured or imported under a specific license and licensed by the Commission for distribution to persons generally licensed under Parts 31 or 35 of this chapter.	Application—New license Renewal Amendment	950 570 230
H. Licenses issued pursuant to Subpart A of Part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material to persons exempt from the licensing requirements of Part 30 of this chapter, except: (1) §§ 32.11 and 32.18 of this chapter. (2) specific licenses authorizing redistribution of items and quantities which have been manufactured or imported under a specific license and licensed by the Commission for distribution to persons exempt from the licensing requirements of Part 30 of this chapter, and (3) specific licenses which authorize distribution of timepieces, hands, and dials.	Application—New license Renewal Amendment	950 570 230
I. Licenses issued pursuant to § 32.18 of this chapter to distribute quantities of byproduct material to persons exempt from the licensing requirements of Part 30 of this chapter.	Application—New license Renewal Amendment	190 150 40
J. Licenses issued pursuant to § 32.14 of this chapter to distribute timepieces, hands, and dials containing hydrogen 3 or promethium 147 to persons exempt from the licensing requirements of Part 30 of this chapter.	Application—New license Renewal Amendment	190 150 40

[See footnotes at end of table.]

Category of materials licenses	Type of fee [1]	Fee
K. Licenses for possession and use of byproduct material for research and development, except those licenses covered by categories 3A or 3B, and licenses covered by categories 7B or 7C authorizing medical research.	Application—New license	190
	Renewal	150
	Amendment	40
L. All other specific byproduct material licenses, except those in categories 4A through 10A.[2]	Application—New license	110
	Renewal	110
	Amendment	40
4. Waste disposal:		
A. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material, from other persons for the purpose of commercial disposal by land or sea burial by the licensee.	Application	32,000
	New license [4]	291,100
	Renewal [4]	98,500
	Amendment: [3]	
	Major—Safety and environmental [4]	197,700
	Minor—Safety and environmental	690
	Administrative	150

[See footnotes at end of table.]

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B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of packaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.	Application—New license	1,100
	Renewal	570
	Amendment:	
	Safety and environmental	570
	Administrative [3]	150
C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.	Application—New license	190
	Renewal	150
	Amendment	40
5. Well logging and well surveys and tracer studies: A. Licenses for possession and use of special nuclear material and/or byproduct material for well logging, well surveys, and tracer studies.	Application—New license	460
	Renewal	460
	Amendment	110

[See footnotes at end of table.]

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Category of materials licenses	Type of fee [1]	Fee
6. Nuclear laundries: A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material.	Application—New license	460
	Renewal	460
	Amendment	110
7. Human use of byproduct material, source material, or special nuclear material:		
A. Licenses issued pursuant to Parts 30, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices.	Application—New license	300
	Renewal	270
	Amendment	40
B. Licenses issued pursuant to Parts 30, 40, and 70 of this chapter to medical institutions, or two or more physicians on a single license, for human use of byproduct material, source material, or special nuclear material, except licenses in category 7A.	Application—New license	190
	Renewal	150
	Amendment	40
C. Licenses issued pursuant to Parts 30, 40, and 70 of this chapter to an individual physician for human use of byproduct material, source material, or special nuclear material, except licenses in category 7A.	Application—New license	190
	Renewal	150
	Amendment	40
8. Civil defense: A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities.	Application—New license	190
	Renewal	150
	Amendment	40
9. Device, product, or sealed source safety evaluation:		
A. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material, except reactor fuel devices and devices or products distributed to general licensees or persons exempt from the requirements for a license pursuant to Parts 30, 40, and 70 of this chapter.	Application—Evaluation	570

[See footnotes at end of table.]

Category of materials licenses	Type of fee [1]	Fee
B. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, except: (1) Reactor fuel, (2) sealed sources distributed to general licensees or persons exempt from the requirements for a license pursuant to Parts 30, 40, and 70 of this chapter, and (3) power sources covered by category 10.	Application—Evaluation	110
10. Power source: A. Licenses for the manufacture and distribution of encapsulated byproduct material or special nuclear material wherein the decay energy of said material is used as a source of power, except reactor fuel.	Application—New license	1,900
	Renewal	460
	Amendment	460
11. Transportation of radioactive material: A. Evaluation of spent fuel cask for greater than 20 kW decay heat.	Application	8,000
	Approval [4]	75,100
	Amendments: [5]	
	Major [4]	6,900
	Minor [4]	3,500
	Administrative	150
	Renewal	150
B. Evaluation of spent fuel cask for less than 20 kW decay heat; air shipping package for plutonium; high-level waste casks; and packages containing radioactive material greater than 2,000 times the type A quantity.[7]	Application	5,500
	Approval [4]	7,000
	Amendments: [5]	62,200
	Major [4]	
	Minor [4]	2,800
	Administrative	150
	Renewal	150
C. Evaluation of fissile packages containing greater than type A quantities of radioactive material; packages containing radioactive material less than 2,000 times the type A quantity.[7]	Application	1,000
	Approval [4]	12,800
	Amendments: [5]	
	Major [4]	3,500
	Minor	690
	Administrative	150
	Renewal	150

[See footnotes at end of table.]

Category of materials licenses	Type of fee [1]	Fee
D. Evaluation of fissile packages containing less than type A quantities of radioactive material; packages containing radioactive material less than 200 times the type A quantity.[7]	Application	700
	Approval [4]	6,200
	Amendments: [3]	
	Major [4]	1,400
	Minor	350
	Administrative	150
	Renewal	150
E. Evaluation of packages containing radioactive material less than 20 times the type A quantity.[7]	Application	200
	Approval [4]	1,200
	Amendments: [3]	
	Major	350
	Minor	150
	Renewal	150
12. Review of standardized spent fuel facility design.[4]	Application	12,000
	Approval [4]	107,200
13. Special projects [8]		

[See footnotes at end of table.]

[1] *Types of fees.* Separate charges as shown in the schedule will be assessed for applications for new licenses and approvals, issuance of new licenses and approvals, and amendments and renewals to existing licenses and approvals. The following guidelines apply to these charges:

(a) *Application fees.* Applications for materials licenses and approvals shall be accompanied by the prescribed application fee for each category, except that applications for licenses covering more than one fee category of special nuclear material (excluding category 1H) to be used at the same location, shall be accompanied by the prescribed application fee for the highest fee category. Where a license or approval has expired, the full application fee for each category shall be due, except for licenses covering more than one fee category of special nuclear material (excluding category 1H) for use at the same location, in which case the application fee for the highest category would apply.

(b) *License approval fees.* New licenses and approvals issued in fee categories 1A through 1H, 2A, 2B, 2C, 4A, 11A through 11E, and category 12, shall pay the license or approval fee for each category, as determined by the Commission when the review of the application or project is completed (see footnote 4), except that a license covering more than one fee category of special nuclear material in categories 1A through 1G shall pay a license fee for the highest fee category assigned to the license.

(c) *Renewal fees.* Applications for renewal of materials licenses and approvals shall be accompanied by the prescribed fee for each category, except that applications for renewal covering more than one fee category of special nuclear material (excluding category 1H) to be used at the same location, shall be accompanied by the prescribed renewal fee for the highest fee category. When the review of an application for renewal is complete for licenses in fee categories 1A through 1H, 2A, 2B, 2C, and 4A, the Commission will examine the renewal fee in accordance with footnote 4, and will refund any overcharges of the renewal fee, if applicable.

(d) *Amendment fees.* Applications for amendments shall be accompanied by the prescribed amendment fee(s). At the time an application for amendment is filed for licenses and approvals in fee categories 1A through 1H, 2A, 2B, 2C, 4A, 11A, 11B, 11C, 11D, and 11E, the licensee or applicant shall provide an initial determination of the amendment class and state the basis therefor as part of the amendment or approval request, and shall remit the

[Footnote continued on next page]

fee corresponding to that determination; however, when review of the amendment or approval is complete, the Commission will examine the amendment fee in accordance with footnote 4, if applicable, and will refund any overcharges to the licensee or applicant, or bill the licensee or applicant for the additional amendment fee. Amendments which result from written NRC requests may be exempted from these fees at the discretion of the Commission when the amendment is issued for the convenience of the NRC.

An application for amendment to a license or approval classified in more than one fee category shall be accompanied by the prescribed amendment fee for the category affected by the amendment, unless the amendment is applicable to two or more fee categories, in which case the amendment fee for the highest fee category would apply. An application for amendment to a materials license or approval that would place the license or approval in a higher fee category or add a new category shall be accompanied by the prescribed application fee for the new category, except for applications for amendments increasing the scope of a licensed program from fee categories 1F to 1E, 1G to 1D, 3C to 3D, and 7C to 7B, in which cases the amendment fee for the higher fee category would apply. An application for amendment reducing the scope of a licensee's program shall pay the amendment fee of the fee category assigned to the license at the time the application is filed. Applications to terminate licenses shall not be subject to fees.

[2] Licensees paying fees under categories 1A through 1H are not subject to fees under categories 1I and 1J for sealed sources authorized in the same license. Applicants for new licenses or renewal of existing licenses that cover both byproduct material and special nuclear material in sealed sources for use in gauging devices will pay the appropriate application or renewal fee for fee category 1I only.

[3] A major amendment is defined as one requiring evaluation of many aspects of licensed activities where the proposed action could present a potential risk to the public's health and safety. A minor amendment is defined as one where safety, environmental, or safeguards considerations may be easily resolved. An administrative amendment is defined as an amendment that is pro forma, routine in nature, or has no safety, environmental, or safeguards significance.

[4] When the review of an application is complete, the expenditures for professional manpower and appropriate support services will be determined and

[Footnote continued on next page]

the resultant fee assessed, but in no event will the fee exceed that shown in the schedule of fees for materials licenses and other regulatory services. All administrative amendments are based on fixed charges.

[5] Fees would be applicable only in those instances where a site safety and environmental review has been performed and documented by the Commission for site at which the storage facility is to be located.

[6] Fee is applicable to a license authorizing either production scale activity or research and development scale activity.

[7] A type A quantity is defined in § 71.4(q) of 10 CFR Part 71.

[8] Charge will be separately determined by the Commission taking into account the professional manpower required to conduct the review multiplied by the applicable cost per man-year, plus any appropriate support services costs incurred.

Category of materials licenses	Type of fee [1]	Fee [2]	Maximum frequency [3]
1. Special nuclear material:			
A. Licenses for possession and use of five (5) kg or more of contained uranium 235 in uranium enriched to 20 pct or more, or two (2) kg or more of uranium 233, for fuel processing and fabrication.	Health and safety ...	$5,300	3 per year.
	Safeguards	10,300	Do.
B. Licenses for possession and use of five (5) kg or more of contained uranium 235 in uranium enriched to less than 20 pct, for fuel processing and fabrication.	Health and safety ...	5,300	Do.
	Safeguards	10, 300	1 per year.
C. Licenses for possession and use of two (2) kg or more of plutonium for fuel processing and fabrication.	Health and safety ...	4,600	4 per year.
	Safeguards	11,700	3 per year.
D. Licenses for possession and use of five (5) kg or more of contained uranium 235 in unsealed form, or two (2) kg or more of uranium 233 in unsealed form for activities other than fuel processing and fabrication.	Health and safety ...	4,900	1 per year.
	Safeguards	7,600	2 per year.

[See footnotes at end of table.]

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E. Licenses for possession and use of quantities of plutonium of two (2) kg or more in unsealed form for activities other than fuel processing and fabrication.	Health and safety ...	780	1 per year.
	Safeguards	5,400	2 per year.
F. Licenses for possession and use of 200 g but less than two (2) kg of plutonium in unsealed form.	Health and safety ...	780	1 per year.
	Safeguards	2,300	Do.
G. Licenses for possession and use of 350 g but less than five (5) kg of contained uranium 235 in unsealed form, or 200g but less than two (2) kg of uranium 233 in unsealed form.	Health and safety ...	780	1 every 2 years.
	Safeguards	4,000	1 per year.
H. Licenses for receipt and storage of spent fuel:			
(1) License application for a storage facility of custom design requiring a full design review:			
(a) Storage facility to be located at a new site.	Health and safety ...	780	Do.
	Safeguards	2,900	2 per year.
(b) Storage facility to be located at the site of an existing nuclear facility.	Health and safety ...	780	1 per year.
	Safeguards	2,900	2 per year.

[See footnotes at end of table.]

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Category of materials licenses	Type of fee [1]	Fee [2]	Maximum frequency [3]
(2) License application for a storage facility which references an approved standardized design:			
(a) Storage facility to be located at a new site.	Health and safety ...	780	1 per year.
	Safeguards	2,900	2 per year.
(b) Storage facility to be located at the site of an existing nuclear facility.	Health and safety ...	780	1 per year.
	Safeguards	2,900	2 per year.
(3) License application for a storage facility of duplicate design—design which is identical to a previously licensed detail design:			
(a) Storage facility to be located at a new site.	Health and safety ...	780	1 per year.
	Safeguards	2,900	2 per year.
(b) Storage facility to be located at the site of an existing nuclear facility.	Health and safety ...	780	1 per year.
	Safeguards	2,900	2 per year.
I. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems.	Health and safety ...	330	1 every 5 years.

[See footnotes at end of table.]

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J. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity as defined in § 150.11 of part 150 which shall pay the same rate as category 1G and special nuclear material for use in power generation which shall pay the fee in category 10.	... do	780	1 per year.
2. Source material:			
A. Licenses for possession and use of source material in milling operations, except in in-situ leaching and heap-leaching operations.	... do	1,800	Do.
B. Licenses for processing and recovery of source material in in-situ leaching operations or heap-leaching operations.	... do	1,800	Do.
C. Licenses for refining uranium mill concentrates to uranium hexafluoride.	... do	1,800	Do.
D. All other source material licenses	... do	460	1 every 2 years.

[See footnotes at end of table.]

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Category of materials licenses	Type of fee [1]	Fee [2]	Maximum frequency [3]
3. Byproduct material:			
A. Licenses for possession and use of byproduct material issued pursuant to parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution, except byproduct material for use in power generation which shall pay the fee in Category 10.[4]	Health & Safety: [5]		
	Large program	1,600	1 per year.
	Small program	780	Do.
B. Licenses issued pursuant to § 32.72 of this chapter authorizing the processing or manufacture and distribution of radio-pharmaceuticals containing byproduct material.	Health & Safety	650	1 every 3 years.
C. Licenses for byproduct material issued pursuant to part 34 of this chapter for industrial radiography operations performed in a shielded radiography installation(s) or permanently designated area(s) at the address(es) listed in the license.[4]	... do	720	1 per year.

[See footnotes at end of table.]

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D. Licenses for byproduct material issued pursuant to part 34 of this chapter for industrial radiography operations performed in a shielded radiograph installation(s) and at multiple temporary locations at the address(es) shown in the license or at temporary jobsites of the licensee in the field.[4]	... do	980	Do.
E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials where the source is not removed from its shield (Self-shielded units).	... do	390	1 every 5 years.
F. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials where the source is exposed for irradiation purposes.	... do	390	1 every 3 years.

[See footnotes at end of table.]

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Category of materials licenses	Type of fee [1]	Fee [2]	Maximum frequency [3]
G. Licenses issued pursuant to Subpart B of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material to persons generally licensed under part 31 or 35 of this chapter, except specific licenses authorizing redistribution of items which have been manufactured or imported under a specific license and licensed by the Commission for distribution to persons generally licensed under parts 31 or 35 of this chapter.	... do	390	Do.
H. Licenses issued pursuant to Subpart A of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material to persons exempt from the licensing requirements of part 30 of this chapter, except (1) §§ 32.11 and 32.18 of this chapter, (2) specific licenses authorizing redistribution of items and quantities which have been manufactured or imported	... do	390	Do.

[See footnotes at end of table.]

under a specific license and licensed by the Commission for distribution to persons exempt from the licensing requirements of part 30 of this chapter, and (3) specific licenses which authorize distribution of timepieces, hands and dials.			
I. Licenses issued pursuant to § 32.18 of this chapter to distribute quantities of byproduct material to persons exempt from the licensing requirements of part 30 of this chapter.	... do	390	Do.
J. Licenses issued pursuant to § 32.14 of this chapter to distribute timepieces, hands, and dials, containing hydrogen 3 or promethium 147 to persons exempt from the licensing requirements of part 30 of this chapter.	... do	390	Do.
K. Licenses for possession and use of byproduct material for research and development, except those licenses covered by categories 3A or 3B, and licenses covered by categories 7B or 7C authorizing medical research.	... do	390	Do.

[See footnotes at end of table.]

Category of materials licenses	Type of fee [1]	Fee [2]	Maximum frequency [3]
L. All other specific byproduct material licenses, except those in categories 4A through 10A.	... do	390	1 every 5 years.
4. Waste disposal:			
A. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material, from other persons for the purpose of commercial disposal by land or sea burial by the licensee.	... do	980	1 per year.
B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material, from other persons for the purpose of packaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.	... do	650	1 every 3 years.

[See footnotes at end of table.]

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C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material, from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.	... do	650	Do.
5. Well logging and well surveys and tracer studies:			
A. Licenses for possession and use of special nuclear material and/or byproduct material for well logging, well surveys, and tracer studies.	... do	520	Do.
6. Nuclear laundries:			
A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material.	... do	590	Do.

[See footnotes at end of table.]

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Category of materials licenses	Type of fee [1]	Fee [2]	Maximum frequency [3]
7. Human use of byproduct material, source material, or special nuclear material:			
A. Licenses issued pursuant to parts 30, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices.	... do	460	1 every 2 years.
B. Licenses issued pursuant to parts 30, 40, and 70 of this chapter to medical institutions, or two or more physicians on a single license, for human use of byproduct material, source material, or special nuclear material, except licenses in category 7A.	... do	460	1 every 3 years.
C. Licenses issued pursuant to parts 30, 40, and 70 of this chapter to an individual physician for human use of byproduct material, source material, or special nuclear material, except licenses in category 7A.	... do	330	Do.

[See footnotes at end of table.]

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8. Civil defense:			
A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities.	... do	200	1 every 10 years.
9. Device, product, or sealed source safety evaluation:			
A. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material, except reactor fuel devices and devices or products distributed to general licensees or persons exempt from the requirements for a license pursuant to parts 30, 40, and 70 of this chapter.	Not applicable		No inspections conducted.
B. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, except (1) reactor fuel, (2) sealed sources distributed to general licensees or persons exempt from the requirements for a license pursuant to parts 30, 40, and 70 of this chapter, and (3) power sources covered by category 10.	... do		Do.

[See footnotes at end of table.]

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Category of materials licenses	Type of fee [1]	Fee [2]	Maximum frequency [3]
10. Power source:			
A. Licenses for the manufacture and distribution of encapsulated byproduct material or special nuclear material wherein the decay energy of said material is used as a source of power, except reactor fuel.	Health and safety ...	780	1 per year.
11. Transportation of radioactive material:			
A. Evaluation of spent fuel cask for greater than 20 kW decay heat.	Not applicable		No inspections conducted.
B. Evaluation of spent fuel cask for less than 20 kW decay heat; air shipping package for plutonium; high-level waste casks; and packages containing radioactive material greater than 2,000 times the type A quantity.	... do		Do.
C. Evaluation of fissile packages containing greater than type A quantities of radioactive material; packages containing radioactive material less than 2,000 times the type A quantity.	... do		Do.

[See footnotes at end of table.]

D. Evaluation of fissile packages containing less than type A quantities of radioactive material; packages containing radioactive material less than 200 times the type A quantity.	... do		Do.
E. Evaluation of packages containing radioactive material less than 20 times the type A quantity.	... do		Do.
12. Review of standardized spent fuel facility design.	... do		Do.

[1] *Types of Fees*—Separate charges as shown in this schedule will be assessed for each routine inspection which is performed.

[2] Inspection fees are due upon receipt of notice from the Commission. The inspection fee for licenses covering more than one fee category will be charged only for the highest fee category assigned the license, if the inspection of the entire license is done at the same time. Where a licensee holds more than one materials license at a single location, a fee equal to the highest fee category covered by the licenses will be assessed, if the inspections are conducted at the same time.

[3] The frequency shown in the schedule is the maximum number of each type of inspection for which a fee will be assessed.

[4] Where a license authorizes shielded radiographic installations or manufacturing installations at more than one address, a separate fee will be assessed for inspection of each location, provided, however, that if the multiple installations are inspected during a single visit a single inspection fee will be assessed.

[5] For inspection purposes, large and small programs in Category 3A are defined as follows: A. *Large Programs*—Those licensees handling or processing loose or unsealed material for the manufacture of tagged compounds or products such as sealed sources and distribution of same to others. *Small Programs*—Those licensees who are processors of "finished products," such as previously tagged compounds and sealed sources for introduction into products or repackaging for sale to others.

ENFORCEMENT

§ 170.41 Failure by applicant or licensee to pay prescribed fees.

In any case where the Commission finds that an applicant or a licensee has failed to pay a prescribed fee required in this part, the Commission will not process any application and may suspend or revoke any license or approval involved or may issue an order with respect to licensed activities as the Commission determines to be appropriate or necessary in order to carry out the provisions of this part, Parts 30, 40, 50, 70, and 71 of this chapter, and of the Act.

No. 79-782

In the Supreme Court of the United States

OCTOBER TERM, 1979

MISSISSIPPI POWER & LIGHT COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-23a) is reported at 601 F. 2d 223.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1979. The petition for a writ of certiorari was filed on November 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly held that a licensing fee schedule adopted by the Nuclear Regulatory Commission is consistent with the Independent Offices Appropriation Act of 1952, 31 U.S.C. 483a.

STATEMENT

Petitioners challenge a licensing fee schedule adopted by the Nuclear Regulatory Commission on February 9, 1978, providing for reimbursement to the government of the Commission's costs in evaluating and processing applications for licenses to build or operate nuclear power plants or to possess or use defined nuclear materials and for the cost of routine inspections of certain facilities. 43 Fed. Reg. 7210 (1978); 10 C.F.R. Part 170. See Pet. App. 45a-120a. Authority for the fee schedule is derived from the Independent Offices Appropriation Act of 1952 ("IOAA"), 31 U.S.C. 483a, under which federal agencies are authorized and encouraged to recover costs attributable to specific services they render to identifiable recipients. The Commission's final rule revised a fee schedule which had last been amended in 1973.

The Commission's new fee schedule is based on the teaching of two decisions of this Court interpreting the IOAA, *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974); *FPC* v. *New England Power Co.*, 415 U.S. 345 (1974), and four subsequent opinions of the District of Columbia Circuit reviewing various aspects of the Federal Communications Commission's license fee schedule under the IOAA, *National Cable Television Ass'n* v. *FCC*, 554 F. 2d 1094 (1976); *Electronic Industries Ass'n* v. *FCC*, 554 F. 2d 1109 (1976); *National Ass'n of Broadcasters* v. *FCC*, 554 F. 2d 1118 (1976); *Capital Cities Communications, Inc.* v. *FCC*, 554 F. 2d 1135 (1976). Applying the principles of these cases, the Commission formulated the following general guidelines

which were used in establishing the specific fees set forth in the detailed schedule petitioners challenge (Pet. App. 8a n.3):

1. Fees may be assessed to persons who are identifiable recipients of "special benefits" conferred by specifically identified activities of the NRC. The term "specific benefits" includes services rendered at the request of a recipient and all services necessary for the issuance of a required permit, license, approval, or amendment, or other services necessary to assist a recipient in complying with statutory obligations or obligations under the Commission's regulations;
2. All direct and indirect costs incurred by the NRC in providing special benefits may be recovered by fees;
3. It is not necessary to allocate costs in proportion to the degree of public or private benefit resulting from conferring a special benefit on a recipient;
4. Where the identification of the specific beneficiary of NRC activity is obscure, the cost of the activity may not be included in the cost basis for fees;
5. A fee shall not exceed the sum on the average of the direct and indirect costs which the NRC incurs in furnishing the services for a member of the class of recipients for which the fee is assessed; and
6. Calculation of agency costs shall be performed as accurately as is reasonable and practical, and shall be based on specific expenses identified to the smallest practical unit associated with the rendering of the type of agency service to the particular class of recipients.

Under the revised fee schedule, about 80% of the Commission's budgeted regulatory costs were excluded altogether from consideration for possible recovery (Pet. App. 9a). Such excluded costs include those for activities that do not provide specific benefits to identifiable recipients or that have a wholly independent public benefit, such as research, rulemaking, and policy formulation. See 43 Fed. Reg. 7212-7213 (1978). Moreover, because of the extended period of time required for processing license applications and other activities conferring special benefits, there is a delay in recovering even the remaining 20% of the Commission's regulatory costs. Thus, we are informed that under the revised schedule, the Commission recovered only approximately $13 million of its $288 million budget for fiscal year 1978 and $12.5 million of its $326 million budget for fiscal year 1979.

The United States Court of Appeals for the Fifth Circuit, in an opinion reflecting complete agreement with the pertinent aspects of the decisions of the United States Court of Appeals for the District of Columbia Circuit cited above, affirmed the Commission's license fee schedule in all respects. The court held that the Commission has the authority to recover the full cost of evaluating and approving a license application and providing other services to identifiable beneficiaries, even though these activities may also benefit the public. The court thereby rejected the argument that the Commission could recover no fees from applicants because all of the Commission's activities are in the public interest (Pet. App. 9a-14a) and the alternative argument that the Commission could not assess fees for those aspects of the license application review process that petitioners contended served solely the public interest and were not designed specifically to benefit the applicant (Pet. App. 14a-22a). Nor, in the court's view (Pet. App. 14a-16a),

was the Commission required to allocate the total cost of the review of a license application according to the Commission's sense of the relative weight of the public and private benefits. Thus, the court concluded that the Commission could recover from licensees the costs it incurred in performing environmental reviews required by the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321 *et seq.*, as a prerequisite to issuing a license. The court also upheld the recovery of costs for conducting uncontested hearings on license applications and routine inspections of facilities required by the Atomic Energy Act, as well as administrative and other costs attributable to these activities.

ARGUMENT

The decision of the court of appeals is consistent with the governing statute and, contrary to petitioners' assertion, presents no conflict with prior decisions of this Court or of the United States Court of Appeals for the District of Columbia Circuit.

1. Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. 483a, provides in pertinent part: "It is the sense of the Congress that any work, service, * * * benefit, privilege, authority, use, franchise, license, permit * * * or similar thing of value * * * granted * * * or issued by any Federal agency * * * to or for any person * * * shall be selfsustaining to the full extent possible, and the head of each Federal agency is authorized by regulation * * * to prescribe therefor such fee, charge, or price, if any, as he shall determine * * * to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *."

In *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), the Court held that the IOAA should be interpreted to permit the recovery of "fees," not other assessments more in the nature of taxes, and described a fee in this context to be a payment "incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." 415 U.S. at 340.[1] The Court therefore struck down a fee schedule promulgated by the Federal Communications Commission designed to recover the total portion of the FCC's annual budget attributable to regulation of the cable television industry by assessing cable television operators at an annual rate of 30 cents per subscriber. The Court held that to the extent this annual assessment was calculated to recoup the costs of the FCC's general oversight of the cable television industry, the FCC would be requiring the operators to pay not only for special benefits they received—*e.g.*, in the form of the specific approval of operating authority—but also for the benefits accruing to the public at-large, and to that extent the assessment would be more in the nature of a tax than a fee.

Similarly, in *FPC* v. *New England Power Co.*, 415 U.S. 345 (1974), the Court invalidated a fee schedule established by the Federal Power Commission under which it sought to recoup the entire cost of administering the Natural Gas Act and the Federal Power Act (with certain exceptions for costs relating to utilities not subject to FPC jurisdiction) by assessing an annual

[1]The Court observed that a "public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society." *Id.* at 340-341.

fee on natural gas companies with annual operating revenues in excess of $1,000,000 and on jurisdictional utilities. The Court noted that the concept of a "fee" in general presupposes an application for a benefit (415 U.S. at 349), but that under the FPC's schedule, fees could be assessed on utilities or gas companies that had neither asked for nor received the agency's services during the year in question (415 U.S. at 351). The cost of the agency's overall regulation could therefore not be allocated to those companies—except, perhaps, in the case of costs such as those attributable to the development of uniform accounting systems for the industry, for which each company would be an "identifiable recipient" of services who could be assessed a fee notwithstanding the absence of an application requesting those services (*ibid.*).

2. a. Notwithstanding these two decisions of this Court holding that fees may be recovered when an agency bestows a special benefit on an identifiable recipient, petitioners argue that not all costs associated with a Commission function that will concededly confer a special benefit can be recovered. In petitioners' view, the Commission must attempt to ascertain those aspects of the overall function which may be thought to benefit the public and those which are specifically intended to benefit the recipient of a government grant, and to charge the recipient a fee only for costs associated with the latter. In the case of an application for a license, for example, petitioners argue that the Commission cannot require the applicant to pay for costs attributable to the preparation of an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, or an uncontested hearing on the application, both of which, petitioners assert, are stages

in the application review process that are designed to protect the public interest, rather than to bestow a benefit on the ultimate recipient of the license.

Petitioners' argument ignores the fact that the end result of the application process—the issuance of a license—confers a very real and substantial benefit on the recipient. At the same time, the review process leading up to the actual granting of the license presumably is, as a whole, in the public interest. For example, the logic of petitioners' argument would also seem to compel exclusion of the costs of reviewing an application for a license to construct a nuclear reactor for compliance with safety requirements—the very heart of the review process—because a safety review benefits the general public. Accordingly, petitioners' argument could result in the recovery of almost no fees by the Commission. Congress cannot be thought to have authorized and encouraged agencies acting in the public interest to recover fees for the issuance of licenses and, at the same time, intended to deny recovery of those fees because the review process serves the public interest.

Nothing in this Court's decisions in *National Cable Television Ass'n* v. *United States* or *FPC* v. *New England Power Co.*, *supra*, requires exclusion of particular costs incurred in the issuance process merely because the activity involved may benefit the public—at least where, as here, there is no suggestion that the fee based on the agency's overall review costs exceeds the value of the license to the recipient. The Court emphasized in *National Cable Television Ass'n* v. *United States*, *supra*, 415 U.S. at 340, that an agency could recover a fee "incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to * * * run a broadcast station." Such a grant, the Court noted, "bestows a benefit on the applicant, not shared by other

members of society" (415 U.S. at 340-341). The same obviously is true for license applications filed with the Nuclear Regulatory Commission.

In *FPC* v. *New England Power Co.*, *supra*, 415 U.S. at 349-350 & n.3, the Court relied upon Budget Circular No. A-25 (Sept. 23, 1959) in interpreting the IOAA. The Court quoted from the Circular, which provides that a reasonable charge "should be made to each *identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit." 415 U.S. at 349 (emphasis supplied by Court). Immediately after this passage quoted by the Court, the Circular provides:

> Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the *full cost* to the Federal Government of rendering that service. [Budget Circular A-25 at 1 (emphasis added).]

There is no indication that the Court disagreed with this statement. See also *Electronic Industries Ass'n* v. *FCC*, *supra*, 554 F. 2d at 1114 n.12.

Moreover, the fact that the Commission here can recoup at most 20% of its regulatory costs under the schedule under review—and in fact recouped far less than that in fiscal years 1978 and 1979—demonstrates that the Commission has carefully analyzed its various activities in order to isolate and charge for only those that confer special benefits. In *National Cable Television Ass'n* v. *United States*, *supra*, and *FPC* v. *New England Power Co.*, *supra*, on the other hand, the agencies had sought to charge the regulated industry with their *entire* regulatory and oversight costs, without tying those

charges to specific benefits bestowed on particular persons. Finally, to require exclusion of certain costs incurred in the application review process would be inconsistent with the very language of the IOAA, which states that "any work, service, * * * license * * * or similar thing of value * * * granted * * * or issued by any Federal agency * * * *shall be selfsustaining to the full extent possible* * * *" (emphasis added).

b. For these reasons, the IOAA does not, contrary to petitioners' assertion (Pet. 14-16), require the Commission to attempt to allocate the total costs of the license review process on the basis of the supposed relative importance of public and private benefits, and to charge licensees only for the latter costs. Nor does the IOAA require the Commission to forgo recovery of fees for certain discrete phases of the review process, such as the preparation of an environmental impact statement or the conduct of uncontested hearings on license applications (see Pet. 10-11, 13). Construction of a nuclear facility is most assuredly "major federal action" for purposes of NEPA, which therefore requires the preparation of the impact statement as part of the review process (42 U.S.C. 4332(C)). Similarly, 42 U.S.C. 2239(a) requires the Commission to hold a public hearing before it may issue a construction permit for a nuclear reactor. A second hearing is required if any person chooses to contest issuance of the operating license and can establish that he has an "interest which may be affected" by that issuance. Consistent with the policy of recovering the cost of all statutorily mandated steps in providing services to identifiable recipients, the Commission collects a fee covering the cost of uncontested hearings,

including the cost of the Commission's trial staff.[2] Recovery of these costs, like recoupment of the expense of preparing an environmental impact statement, are tied directly to the licensing process and may be recovered under the IOAA. See *Electronic Industries Ass'n* v. *FCC*, *supra*, 554 F. 2d at 1115.

For the same reason, the Commission may charge for routine inspections (see Pet. 11-13). These inspections are authorized by statute and mandated by NRC regulations.[3] They confer a special benefit because they are needed to assure the licensee's compliance with the Atomic Energy Act and the Commission's regulations, which is necessary for retention of the license. The absence of a request by this licensee for an inspection is not, in this setting, dispositive. *FPC* v. *New England Power Co.*, *supra*, 415 U.S. at 351.

Petitioners also argue (Pet. 13-14) that the Commission is precluded from recovering its administrative and technical support costs. But, as the court of appeals pointed out (Pet. App. 20a-21a), the cost of performing a service, such as granting a license to construct a nuclear reactor, involves a greater cost to the agency than merely the salary of the employee who reviews the application. Overhead costs—*e.g.*, depreciation and interest on capital plant and equipment and secretarial support—are all part of the normal course of conducting business. Without these supporting services, the employee could

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[2]The Commission determined, as a matter of policy, that to the extent the costs of contested hearings exceed those of uncontested hearings, these additional costs would not be recouped through fees.

[3]42 U.S.C. 2201(o); 10 C.F.R. 50.70 and 70.55.

not perform the service requested by applicants. Recovery of such "indirect" costs, is expressly authorized by the IOAA.

3. Finally, petitioners argue (Pet. 16-17) that the licensing fee schedule adopted in 1973 by the Commission's predecessor, the Atomic Energy Commission, contravenes the IOAA and that petitioners should be refunded the fees—apparently *all* fees—paid under that schedule. The AEC reviewed the 1973 schedule in light of *National Cable Television Ass'n* v. *United States*, *supra*, and *FPC* v. *New England Power Co.*, *supra*, and determined that of the various license fees previously paid, only the assessment of *annual* fees might be questionable. The AEC therefore refunded those fees. Petitioners' challenge to the remainder of the 1973 schedule is apparently the same as that raised to the 1978 schedule—*i.e.*, that the Commission cannot recover the full cost of licensing, inspections and other activities that concededly confer a special benefit on identifiable recipients—and must be rejected for the reasons already given. Therefore, the Fifth Circuit correctly dismissed the challenge to the 1973 fee schedule.[4] In any event, because the 1973 schedule is no longer in effect, its validity does not present a question of continuing interest warranting review by this Court.

[4]Petitioners assert (Pet. 16) that the court of appeals did not discuss their request for a refund of fees paid under the 1973 schedule. However, the court of appeals stated (Pet. App. 23a) that it had examined petitioners' contentions not separately discussed and found them to be without merit. Thus, the court below considered and rejected petitioners' argument on this point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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